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AMERICAN STATE REPORT

OF THE

UNITED STATES OF AMERICA, OF THE TERRITORIES
AND OF THE NATIONAL RESOURCES

1897

COURTESY OF LATT REPORT

OF THE FEDERAL GOVERNMENT

UNITED STATES OF AMERICA

BY A. C. HARRIS

AND THE ASSISTANT SECRETARY OF THE DEPARTMENT OF THE INTERIOR

Vol. 127

AMERICAN STATE REPORT
PUBLISHED BY THE GOVERNMENT PRINTING OFFICE

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LIV.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1897.

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AMERICAN STATE REPORTS.

VOL. LIV.

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AMERICAN STATE REPORTS.

VOL. LIV.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

CARR v. STATE.

[106 ALABAMA, 35.]

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.—

A statute making it a misdemeanor for a bank, banking corporation, or other person engaged in banking, to receive a deposit of money, or other thing of value knowing himself to be in failing circumstances or insolvent, and providing that upon conviction, he shall be fined not less than double the amount of such deposit, one-half of which shall be paid to the depositor, but that payment to the depositor of the amount deposited with costs, before conviction, shall be a complete defense to any prosecution under the statute, is void, as being in conflict with a constitutional provision declaring "that no person shall be imprisoned for debt."

A. E. Stratton, J. Jackson, and I. Orme, for the appellant.

W. C. Fitts, attorney general, for the state.

McCLELLAN, J. The defendant, Hinton E. Carr, is charged, in one count as the president, and in another as a member, of a banking firm, with receiving from Robert T. Abernathy for deposit three hundred and fifty-five dollars, knowing at the time, or having good cause to believe, that said firm was in a failing or insolvent condition. The indictment is drawn under an act "to prevent banks, bankers, firms, corporations, or other persons from receiving deposits of bank notes, specie money, or other thing of value, when in a failing or insolvent condition," approved December 12, 1892, which is in the following words:

"Section 1. Be it enacted by the general assembly of Alabama, That any president, cashier, or other officer, by whatever title he may be called or known, of any bank, banking firm, or corporation engaged in a banking business, or any other person or persons, engaged in said business, or the agent or agents thereof, who

shall receive for deposit any bank notes, specie money, or other thing of value, knowing at the time said deposit is received, ³⁷ or having good cause to believe, that such bank, banking firm, corporation, person, or persons, are in a failing or insolvent condition, shall for each offense be deemed guilty of a misdemeanor, and on conviction thereof be fined not less than double the amount of said deposit.

"Sec. 2. Be it further enacted, That in all convictions under this act, the fine shall be paid in lawful money of the United States only, one-half of which shall go to the person who made the deposit.

"Sec. 3. Be it further enacted, That the payment back to the depositor of the bank notes, specie money, or other thing of value deposited, before the conviction hereunder, and the court costs thereof, which may have accumulated, shall be a good and lawful defense to any prosecution under this act": Acts 1892-93, pp. 94, 95.

By demurrer to the indictment and motion in arrest of judgment, defendant raised the question of the constitutionality of the foregoing statute, and reserved the court's ruling, sustaining the indictment and statute, for our consideration.

1. The statute, it is insisted for the appellant, is violative of article 1, section 21, of the constitution of the state, which provides "that no person shall be imprisoned for debt." It is to be observed in the outset that this provision of the organic law is essentially different from the provisions on this subject in many other state constitutions, in that it contains no exception of "cases of fraud," and on the same line is essentially different from the constitutions of this state of 1819, 1861, and 1865, in each of which the language is, that "the person of a debtor, where there is not strong presumption of fraud, shall not be detained in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law": Const. 1819, art. 1, sec. 18; Const. 1861, art. 1, sec. 18; Const. 1865, art. 1, sec. 22. This change was made in the constitution of 1868, (Const. 1868, art. 1, sec. 22) where the provision assumed its present form. In *Ex parte Hardy*, 68 Ala. 303, 318, it was held—and we do not understand that there was any division of opinion on this point—that the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, ³⁸ whether they involved fraud or not. So that the statute we are considering can derive no aid from the idea that the receipt of a deposit by a banker under the circumstances stated is a fraud,

and, hence, that the transaction would constitute "a case of fraud," since even in such cases there can be no imprisonment for debt.

2. The "imprisonment for debt" which the framers of constitutions embodying this provision doubtless had most prominently in mind was imprisonment upon process issuing in civil actions, the object and sole purpose of which was the collection of debts; it was to remove the evils incident to the system of taking the debtor's person upon a *capias ad satisfaciendum* that this organic inhibition came primarily to be ordained. But the effect of its ordination has been to establish a public policy much broader in its influence upon legislation and operation upon judicial proceedings than would have sufficed for the eradication of the ills which attended upon a recovery or attempted recovery of debts by restraint of the debtor's person. This policy is inimical alike to the incarceration of a debtor as a means of coercing payment and to his punishment by imprisonment for a failure to pay, at least when such failure results from inability. And hence it is that, while neither the letter of the inhibition, nor the broader policy which is engendered by it and has come to be a part of it, has any application to criminal judgments for fines and costs, yet it is not within legislative competency to declare the mere non-performance of a contract of indebtedness a misdemeanor and punish the commission thereof by imprisonment, directly or indirectly, for, as said in the notes to *State v. Brewer*, 37 Am. St. Rep. 753, 758, "as that which is prohibited to be done directly cannot be accomplished by indirection, the legislature cannot declare the mere nonperformance of a contract to be a misdemeanor, for that would amount to an attempt to legalize imprisonment for debt." And so in Tennessee there was a statute which made it unlawful for any person, firm, corporation, etc., to refuse to cash any checks or scrip issued by them if presented to them within thirty days of its date of issuance, and declared that any such person, etc., so refusing to cash in lawful money such checks or scrip would be guilty of a misdemeanor, and, upon conviction, should be fined not less ³⁹ than ten nor more than twenty-five dollars. The constitutional provision in that state is that "the legislature shall pass no law authorizing imprisonment for debt in civil cases"—terms which would seem to allow greater latitude of legislation in respect of cases of the class we are considering than our own provision—and, bringing the statute to the test of this inhibition, the court said: "The act of the legislature in question, while not directly authorizing imprisonment for debt,

does attempt to create a crime for the nonpayment of debts evidenced by check, scrip, or order, and for such crime provides a penalty, which may or may not be followed by imprisonment. In that way and for that reason, the act is violative of the spirit, if not of the letter, of the constitutional provision above cited. It is an indirect imposition of imprisonment for the nonpayment of debt, and is, therefore, clearly within the constitutional inhibition": *State v. Paint Rock Coal etc. Co.*, 92 Tenn. 81; 36 Am. St. Rep. 68. And this principle of applying the policy of the organic law on this subject to cases which may not be strictly within its letter has received recent recognition by this court: *Ex parte Russellville*, 95 Ala. 19.

The statute involved in the case at bar is a much more flagrant attempt to authorize imprisonment for debt, in our opinion, than that denounced by the supreme court of Tennessee. It was not the avowed purpose of that act to enforce the payment of a debt by means of a prosecution under it. This one cannot be read without conviction that its purpose is to impose imprisonment for debt, and to coerce the payment of a debt by the duress it authorizes. Its requirement that the fine shall be paid only in money, that it shall be double the amount of the deposit, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit, tends, at least, to show that coercion of payment of the debt which the depositary owed to depositor—for the transaction created the relation of debtor and creditor between them—by means of the restraint which the imposition of the fine itself immediately put upon the defendant—not to speak here of his imprisonment preliminary to the trial—and that, failing to enforce payment by means of imprisonment at hard labor for the payment of the fine and costs, was the ⁴⁰ moving purpose and efficient cause of the enactment of the statute. And what doubts on this point might have been left had the statute stopped here are removed beyond peradventure by its further provision that payment to the depositor at any time before conviction "shall be a good and lawful defense to any prosecution under this act." There cannot be two opinions as to the intent and meaning, or the effect upon the whole enactment, of this last and most remarkable provision. It is a declaration of the baldest and most direct character to one party to a transaction, whereby he has incurred a debt to the other, in the name of the state, that unless he pays that debt, he shall be arrested, held to trial, tried, convicted, fined, and imprisoned at hard labor, and this obviously not for any taint of criminality in the transaction out of which

the debt arose, but purely and simply for the nonpayment of the debt. For this default, and until it is purged, either by simply paying the debt and accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and the expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for taking the deposit, if the preliminary imprisonment shall have the desired effect of extorting the money he owes the depositor out of him, and if, as is the case here, the compulsion of preliminary imprisonment fails of its intended effect, he may, under the guise of punishing an act which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminality or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of a debt, be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction. There can, in our opinion, be no sort of doubt that this enactment is violative of the constitutional provision, and therefore void. The trial court erred in overruling the demurrers which went to this point, and the motion in arrest of judgment based upon them. Its judgment ⁴¹ will be reversed, and a judgment will be here entered discharging the defendant.

Reversed and rendered.

CONSTITUTIONAL LAW.—IMPRISONMENT FOR DEBT is the subject of the extended note to *State v. Brewer*, 37 Am. St. Rep. 758-765. A statute very similar to that involved in the principal case was held to be free from constitutional objection in *Meadowcroft v. People*, 163 Ill. 56; post, p. 447.

HENRY v. HALL.

[106 ALABAMA, 84.]

WILLS—TESTAMENTARY CAPACITY.—The fact that a testatrix of good mind and self-reliant character, made and executed her will while she was quite sick, and declared after her recovery that "she could not remember what happened during her illness, and that it all seemed like a dream," is not sufficient to show a want of testamentary capacity.

WILLS—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS.—The facts that a husband of a large beneficiary, who is not related to the testatrix, occupied confidential relations with the latter, attended to and managed her business, employed an attorney to draft the will, dictated its provisions, and enjoined secrecy as to its contents and execution, raises a presumption of undue influence, and casts the burden of proof on such devisee to show that the devise to her was not induced by fraud and coercion on her part, directly or indirectly.

WILLS—UNDUE INFLUENCE.—The fact that the father of a devisee, not related to the testatrix, was present at the signing of the will, and participated in its preparation and execution, does not raise a presumption of undue influence, in the absence of evidence to show that the testatrix was dependent on him, or that he had any influence with or over her, or that he ever advised with her in business matters, or held or occupied confidential or influential relations toward her.

WILLS.—PRESUMPTION OF UNDUE INFLUENCE does not arise from the mere fact of taking an active part in procuring the execution of a will. A presumption of fraud or deceit may arise when the writer of a will takes a legacy under it, but not of undue influence. Such conduct or participation, to create a presumption of undue influence, must be coupled with a benefit under the will, and evidence of confidential relations, or dependency, or some position or fact which tends to show that the party was able to exercise an undue influence if he desired to do so.

WILLS—UNDUE INFLUENCE—EFFECT OF.—If the evidence shows that a will, in part, was the result of undue influence, and in part the act of the testator's own free will, it is not wholly void. The latter part must stand while the former part must be annulled.

WILLS—UNNATURAL BEQUESTS.—A will is not necessarily unnatural because of a discrimination between heirs of the same degree, nor because of the entire exclusion of a part or all of them. The circumstances of the case must determine the naturalness of a donation or bequest.

WILLS—UNNATURAL BEQUESTS.—It cannot be said as matter of law that affection for one, though not of kin, raised from infancy by the donor and who has always been a member of his family, is unnatural, or that a gift or bequest to such person is unnatural. It is a question of fact for the jury.

WILLS—TESTAMENTARY CAPACITY.—The fact that a testatrix was fifty-six years of age at the time of her death does not authorize the jury to draw any unfavorable inference against the validity of the will upon the ground that she was an "old lady," even if she were of that age at the time of the execution of the will.

WILLS—CAPACITY AND UNDUE INFLUENCE—PRESUMPTIONS.—It is not within the province of a jury to determine

the duty of a testator to his next of kin, and no presumption of want of testamentary capacity or undue influence arises from the mere fact that a testator has not disposed of his property as a jury supposes it should have been disposed of, or that a different disposition was made of it than made by law in cases of intestacy. These are mere circumstances to be weighed with other evidence.

APPELLATE PRACTICE.—OBJECTIONS TO CERTAIN PARTS OF DEPOSITIONS, not identified further than by a reference to certain lines of the originals, cannot be considered on appeal for want of means of identifying the objectionable parts in the transcript.

APPELLATE PRACTICE—EXCLUSION OF EVIDENCE.—A general exception to the entire ruling of the trial court in granting a motion to exclude testimony in general including both legal and illegal evidence, is not ground for a reversal of the judgment.

WILLS—WITNESSES — INTEREST — COMPETENCY.—The estate of the testator is not a party in interest in proceedings to probate the will so as to prevent all parties interested from testifying to any fact which is relevant and material to the issue.

Merrill & Bridges, for the appellant.

Aiken & Burton, for the appellee.

94 COLEMAN, J. The appeal comes up from a contest of the probate of the will of Lucinda R. Jenkins. The grounds of contest were, fraud, undue influence, and mental incapacity. Decedent left no issue. The contestants were the brothers and sisters of testatrix, and the beneficiaries under the will were Dora Hall, wife of proponent, George W. Hall, and James O. B. Jenkins, a youth about ten years of age, neither of whom were of blood kin of testatrix, and the beneficiaries under the will were Dora Hall, from infancy, and that until her marriage and afterward, until death of testatrix, they had lived together. The evidence shows that when James O. B. Jenkins, the other devisee, was about eight days old his mother died, and a day or two before her death she gave her infant to testatrix, who took him, and kept him until he was six or seven years old, and then sent the boy to his father, Green B. Jenkins. It is in evidence that she spoke of both as her children, and they always called her "Ma" or "Mama."

There is not a particle of evidence tending to show that testatrix, either before or after the execution of the will, was wanting in a testamentary capacity, except the evidence that she was quite sick at the time of its execution, and a declaration, testified to by the wife of one of the contestants, that after her recovery and while on a visit to see them, she stated that "she could not remember what happened during her illness," and that it all "seemed like a dream." Otherwise, the evidence shows that she was a woman of good mind and of self-reliant character.

There is no evidence that either of the beneficiaries under the will in person, at any time by word or act, ⁹⁵ did or attempted to exercise any influence over her as to the disposition of her property. In fact, we cannot well see how a mere boy, not exceeding ten years of age, who was not present, could control or influence the disposition of her property. The contest as to undue influence is rested upon the grounds: 1. Declarations of testatrix, testified to by contestants, that she was not satisfied with the way George W. Hall, husband of Dora Hall, managed her property, and that she did not want the Jenkinsses to have any of her property; 2. The character of the disposition of her property, in that she gave it all to Dora Hall and James O. B. Jenkins and none to her heirs at law, and declarations to the effect that the law was a good enough will for her; 3. The confidential relations of George W. Hall, and the active part of Hall, whose wife was a beneficiary, and that of Green B. Jenkins, father of the other legatee, in procuring the execution of the will. If the will was procured by undue influence, whether exercised directly by the beneficiaries, or others for them, the result would be the same.

That testatrix signed an instrument properly attested which purports to be her last will and testament is not an open question. There is evidence by disinterested witnesses of repeated declarations on her part to the effect that she intended "Dora and Jimmie" to have her property. There is evidence also by her attending physician and other disinterested witnesses that her mental condition was good at the time the instrument was executed, and none to the contrary, except the fact of her illness and declarations alleged to have been made after her recovery. The evidence tends to show that George W. Hall, the husband of Dora, with whom testatrix resided, attended to and managed her business for her. It also shows that he and Green B. Jenkins employed an attorney to write the will, and dictated its provisions to the attorney, and enjoined secrecy upon him as to its contents and execution. Although there was no devise or bequest to George W. Hall, being the husband of Dora Hall, we are of opinion the facts of the case bring the devises or bequests to Dora Hall under the influence of the principle declared in *Bancroft v. Otis*, 91 Ala. 279, 24 Am. St. Rep. 904, and "raise up a presumption of undue influence and cast the burden upon her of ⁹⁶ showing that it was not induced by coercion or fraud on her part, directly or indirectly."

We are of opinion that the facts do not raise the same presumption as to James O. B. Jenkins. His father, Green B. Jenkins, it is true, was present when the will was signed, and there is evi-

dence tending to show that he participated with George W. Hall in all matters relating to its preparation and execution. There is an utter absence of evidence tending to show that testatrix was dependent on him, or that he had any influence with or over her or that he ever advised or consulted with her in business matters or held or occupied a confidential relation or one of influence toward her in any respect. The presumption of undue influence does not arise from the mere fact of taking an active part in procuring the execution of a will. A presumption of fraud or deceit may arise when the writer of the will takes a legacy under it, but not of undue influence. Such conduct or participation, to create a presumption of undue influence, must be coupled with a benefit under the will and evidence of confidential relations, or dependency, or some position or fact which tends to show that the party was able to exercise an undue influence, if he desired to do so. There is no evidence in this record which tends to place Green B. Jenkins in this relation toward the testatrix. She had brothers and sisters living in the same village with her and near by. Green B. Jenkins lived in a different state, and was by no means a frequent visitor. His testimony is, that he was requested by testatrix to have her will written, that she gave him instructions as to how it should be prepared, and requested him to ask the attorney who wrote it to make no mention of the matter to anyone, giving her reasons at the time, and that he simply followed her instructions in all respects. It is proven beyond all question, that the will was read over to her, and that she expressed her entire satisfaction with its provisions: *Lyons v. Campbell*, 88 Ala. 469; *Garrett v. Heflin*, 98 Ala. 615, 618; 39 Am. St. Rep. 89; *Daniel v. Hill*, 52 Ala. 430. So far as James O. B. Jenkins is concerned, the evidence, without conflict and without any contrary legal presumptions, shows that the influence exercised in his interest was purely from affection for him, and the court would not have erred in so instructing the jury, upon written request. George W. Hall offered evidence ⁹⁷ tending to overcome the presumption of undue influence which rested on him. Where the evidence shows that the will, in part, was the effect or result of undue influence, and in part the act of the testator's own free will, the will is not wholly void. The latter must stand, although annulled as to the former: *Eastis v. Montgomery*, 93 Ala. 299; *Lyons v. Campbell*, 88 Ala. 462; *Florey v. Florey*, 24 Ala. 248.

With these principles settled, we will proceed to consider the instructions for the jury, given and refused by the court, upon which appellants have assigned errors, and which are discussed in the written arguments and briefs of counsel. Errors assigned

in civil cases which counsel do not consider of sufficient importance to receive consideration by them, and there are many of this description in this case, will be regarded by us also as unimportant. The errors in relation to the instructions insisted upon in argument are those which refer: 1. To the declarations of testatrix made after her recovery in regard to her mental condition during her sickness when the instrument was executed; and 2. Those based upon the evidence which refer to the action and conduct of George W. Hall and Green B. Jenkins in procuring the execution of the will; and 3. Those based upon the alleged unnatural character of the will.

Refused charges Nos. 2 and 3 relate to the first proposition. The entire evidence under this proposition, that admitted and that excluded, was given by W. J. Henry, a brother, Z. E. A. Henry, who we infer was his wife, and is as follows: W. J. Henry: "She said she did not remember much that occurred during her sickness and that everything seemed like a dream." Mrs. E. A. Henry: "She made us a visit about a month or more after her sickness. She said that she could not remember nothing during her sickness clearly. That everything seemed like a dream to her, and said she had not been fit to attend to business of any kind for the past twelve months. Yes, she said she could not recollect nothing that was said during her sickness. She said she did not get the attention she should have had while sick, and that everything seemed like a dream while sick. She remembered me being there during her sickness." The charges (2 and 3) single out a fact and give it undue prominence. Such charges are misleading and ^{are} argumentative, and in refusing them the court did not commit a reversible error. The declarations which were made a month afterward, if competent for any purpose, did not justify the inference that, at the time of the execution of the will, she did not have testamentary capacity, as asserted in the second charge; nor would these facts, when considered in connection with all the evidence, justify a finding of testamentary incapacity. These witnesses testify that, on the night and just before the will was signed, testatrix noticed that Hall and Jenkins were absent. She inquired where they were, and remarked that they were staying out late. They testify that she requested them to stay all night, and not one of them gives evidence of any fact which in any manner indicates that at that time she was not competent to make a will. The court would have been fully justified, under the evidence, in instructing the jury that testatrix possessed testamentary capacity. The only questions open for discussion are of fraud and undue influence.

Charge 4 is abstract. There is no evidence that the beneficiaries under the will, and especially as to James O. B. Jenkins, personally were active in the preparation and procuring the execution of the will, and that confidential relations, in the meaning of the law, existed between him, or either beneficiary, and testatrix.

Charges 5 and 6 are objectionable in this: They demand a verdict against the validity of the will, upon the facts predicated, without reference to the explanatory evidence. Although the facts predicated in these charges may be true, yet if the jury believe from the evidence that Green B. Jenkins, in all he did, acted under the free and voluntary instructions of testatrix, the facts predicated in these charges would not justify a conclusion adverse to the validity of the will. This principle was declared in the cases of *Eastis v. Montgomery*, 95 Ala. 486, 493; 36 Am. St. Rep. 227; *Bancroft v. Otis*, 91 Ala. 290; 24 Am. St. Rep. 904. These charges also ignored another principle of law, well settled, and this is, that a will may be valid in part and invalid in part. The proof fails to establish confidential relations or such relations between Green B. Jenkins and testatrix as to raise a presumption of undue influence as to him upon the facts predicated, whatever may be true as to ⁹⁹ George W. Hall. Charge 9 is especially faulty in this respect.

Charges 7 and 8 are not only subject to the same criticism, but are faulty in its definition of an "unnatural will." A will is not necessarily unnatural because of a discrimination between heirs of the same degree, or because of the entire exclusion of a part or all of them. The circumstances of the case must determine the naturalness of a donation or bequest. It cannot be said, as a matter of law, that affection for one, though not of kin, raised from infancy by the donor, and who has always been a member of the family of the donor, is unnatural, or that a gift or bequest to such a person is unnatural. It is a question of fact for the jury. Those questions were fully considered in *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33; *Eastis v. Montgomery*, 95 Ala. 486; 36 Am. St. Rep. 227.

Charge 11 is not only infected with the infirmity which pervades charges 5 and 6, but abstract in the predicate that Dora Hall received a "large benefit" under the will. There is no evidence of the value of the estate in the record.

The evidence shows that testatrix was fifty-five years old at the time of her death. Her age would not authorize the jury to draw any unfavorable inference against the validity of the will upon the ground that she was "an old lady." Charge 12 was

faulty in this respect, in addition to the objection that it ignores explanatory evidence, and subjects James O. B. Jenkins to the presumptions of law which arise from the confidential relations of George W. Hall to testatrix.

Charges 13, 14, and 15, are subject to criticism applied to other charges. Fifteen is also argumentative. It is no part of the province of a jury to determine the duty of a testator to his next of kin, and no presumptions of incapacity or undue influence arise from the mere fact that a testator has not disposed of his or her property, as a jury might suppose it should have been disposed of or that a different disposition was made of it than made by the law in cases of intestacy. These are mere circumstances to be weighed with other evidence.

There was no error in refusing charge 16: *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235; *Eastis v. Montgomery*, 95 Ala. 486; 36 Am. St. Rep. 227; *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33.

Charge 17 is argumentative and in some respects abstract. ¹⁰⁰ What we have said in reference to some other charges applies to No. 18. No. 19 is confused, abstract in some respects, and erroneous in principle.

Charges given for proponent have not been discussed in argument for appellant, and we will not consider them.

There was no error in overruling the motion to suppress the deposition of the witness Evans as a whole. The motion was not sustained by the facts. Objection to certain parts of a deposition, which are not identified further than by a reference to lines 12 to 21, and 27 to 29 of the original deposition, cannot be considered. We have no means of identifying the objectionable part in the transcript of appeal. There is no merit in any assignment of error based upon the ruling of the court upon questions of evidence, except that contained in the 24th assignment of error. The declarations of testatrix testified to by John A. Henry, according to the date given by him, were made in April, 1891, and were prior in time to the execution of the will. These statements were admissible in evidence, and, if the motion to exclude had applied to these statements alone, the action of the court in excluding them might have constituted a reversible error; but the motion included also the statements testified to by G. W. J. Henry, some of which were made some time after the execution of the will, such as "she did not remember much about her sickness," "it seemed like a dream," and were no part of the *res gestae*. In the case of *Roberts v. Trawick*, 13 Ala. 68, it was held that such statements were not admissible. This rule was subsequently reco-

ognized or followed in the following cases: *Roberts v. Trawick*, 17 Ala. 55; 52 Am. Dec. 164; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Seale v. Chambliss*, 35 Ala. 22; and the principle is sustained by the following authorities: *Smith v. Fenner*, 1 Gall. 170; *Iddings v. Iddings*, 7 Serg. & R. 111; 10 Am. Dec. 450; 2 Greenleaf on Evidence, sec. 690. The motion to exclude was general and included both legal and illegal evidence, and the exception embraced both that which was legal as well as the illegal. We will not put the court in error upon a motion and an exception to the ruling of the court, either in admitting or excluding evidence, a part of which is legal and a portion illegal, when the exception goes to the entire ruling of the court. The grounds upon which the motion to exclude ¹⁶¹ the evidence was based were not well taken, as has been stated, but the action of the court can be sustained upon those stated by us. Notwithstanding the witness John A. Henry fixes April as the time when these declarations were made, judging from their character and the other facts in the case, we are of opinion they were really made after the execution of the will.

The estate of a decedent is not interested, within the meaning of the law, in proceedings to probate a will. The estate remains the same whether the will be probated or not. All parties in interest are competent to testify to any fact which is relevant and material to the issue. This is the rule declared in *Kumpe v. Coons*, 63 Ala. 448, and the amendments to the statute have not changed the rule in this respect: Acts of 1890-91, p. 557; Code of 1886, sec. 2765. It is clear, upon the whole testimony, that the admission of this evidence ought not to have changed the result of the contest. The evidence clearly established that the testatrix had testamentary capacity, and the execution of the will is in legal form. The evidence of disinterested witnesses shows that testatrix was strongly attached to those whom she had raised from infancy, and often expressed a desire that they should succeed to her property. The only evidence which can be said in any manner to conflict with such intention or desire on her part is the declaration, testified to by those interested as legal heirs, "that she had done enough for the Jenkinses, and that the law was a good enough will for her." The only evidence of undue influence is the declaration that she was not satisfied with the way Hall managed her property, and presumption of law arising from the confidential relation of George W. Hall to testatrix, and the part taken by him and Green B. Jenkins in having the will written and in procuring its execution. In this matter both testify that

they simply obeyed her instructions. The attesting witnesses testify that she had the will read over to her in their presence, and that she expressed her entire satisfaction with it. Her attending physician swears her mind was good, and there were facts which show she was capable of making a will, and there is no witness who testifies otherwise as to her testamentary capacity at the time of the execution of the will.

In view of all these facts, we are of opinion the case ought to be affirmed.

IN THE CASE of Higginbotham v. Higginbotham, 106 Ala. 314-317, Mr. Justice McClellan, delivering the opinion of the court, said: "The evidence tends to show that, up to within a year of making his will, it was the intention of the testator to make some substantial provision therein for the contestant, and that to have so provided for her would have been most natural and just; but the will propounded contains no such provision. There is also a tendency of the evidence to show that A. L. Higginbotham, the son of the testator, one of the proponents, between whom and his brother the will propounded divides substantially all the testator's property, and who is made with said brother an executor of the will, had said before the will was executed that he would see to it that the contestant received nothing from the estate of the testator, and that he was active in inducing his father to go to the office of an attorney, some miles from where they lived, for the purpose of having drawn up and executing a will, that he was insistent that his father should go, that the testator was reluctant to go, but finally consented, and was accompanied by said son. It also appeared that the proponents, for some time before the will was executed, attended to all their father's business affairs. All these facts, and perhaps others which find lodgment in tendencies of the evidence, were proper to go to the jury and to be considered by them in determining whether the will was the result of undue influence, exercised by the proponents and chief beneficiaries upon the mind and will of the testator, and with them in the case the court very properly refused the affirmative charge requested by the proponents: *Bancroft v. Otis*, 91 Ala. 279.

"Charge 2 requested by the proponents is faulty in that it requires vitiating undue influence to be the equivalent of force or coercion, when fraud is equally patent; and it is misleading in requiring 'proof that the will was obtained by this coercion, by importunity which could not be resisted,' since if the jury found, as it was open to them to do, that confidential relations existed between the proponents and the testator, and that the proponents were active in the manner shown by a tendency of the evidence in and about the making of his alleged will, the burden was thereupon shifted to the proponents to rebut the presumption of undue influence arising from these facts, and, if they failed to rebut this presumption, the final conclusion should have been that the will was the result of coercion or fraud, though in a sense there was no 'proof that it was obtained by coercion, or by importunity which could not be resisted.' Or, in other words, the charge had a direct tendency to mislead the jury as to the burden of proof in a contingency which had arisen in the case: *Bancroft v. Otis*, 91 Ala. 279; 24 Am. St. Rep. 904; *Eastis v. Montgomery*, 93 Ala. 293; 95 Ala. 486; 36 Am. St. Rep. 227; *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 33."

WILLS—TESTAMENTARY CAPACITY.—To have a sound and disposing mind and memory, a testator must have active memory

enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and act with sense and judgment in making his will: *Hall v. Perry*, 87 Me. 569; 47 Am. St. Rep. 352, and note.

WILLS—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS. The presumptions in favor of the validity of a will attacked for undue influence are increased, rather than diminished, from the circumstance that a bequest was made to one with whom the testator maintained intimate and confidential relations during life: *Goodbar v. Lidikey*, 136 Ind. 1; 43 Am. St. Rep. 296, and note. See further the extended note to *In re Hess' Will*, 31 Am. St. Rep. 670.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—Undue influence in the execution of a will is never presumed. The burden of proof to show it is generally upon the contestant: *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828, and note. See, also, the extended notes to *In re Hess' Will*, 31 Am. St. Rep. 681, and *Richmond's Appeal*, 21 Am. St. Rep. 94-104.

WILLS—UNDUE INFLUENCE MAY AFFECT ONLY A PART OF A WILL, and, when this is shown, the will will be denied probate only as to the part or parts procured by the undue influence: Extended note to *In re Hess' Will*, 31 Am. St. Rep. 691.

WILLS—UNDUE INFLUENCE—UNJUST DISCRIMINATION. A testator having sufficient mental capacity may make an unreasonable, unjust, and injudicious will, and a jury has no right to alter the disposition thus made of the property merely because justice is not done to his family connections: *Berberet v. Berberet*, 131 Mo. 399; 52 Am. St. Rep. 634, and note.

WILLS—TESTAMENTARY CAPACITY—OLD AGE.—Great age alone does not constitute testamentary incapacity, if a testator had a mind and memory sufficient in essentials and capable of acting rationally, and the will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness: *Hall v. Perry*, 87 Me. 569; 47 Am. St. Rep. 352, and note.

O'BEAR JEWELRY COMPANY v. VOLFER.

[106 ALABAMA, 205.]

CORPORATIONS — INSOLVENCY — PREFERENCES.—The mere insolvency of a corporation does not render its assets a trust fund in its hands for the benefit of its creditors in the strict sense of that term, so as to prevent it from giving a preference to one or more of its creditors to the exclusion of others.

CORPORATIONS — INSOLVENCY — PREFERENCES — EQUITY JURISDICTION.—The property of an insolvent corporation is not a trust fund or estate, accurately speaking, so as to prevent it from making preferences among its creditors in any sense other than that when a chancery court takes possession and control of such property upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be administered for the equal benefit of the corporation creditors.

Ward & John, and Dickinson & Kerr, for the appellants.

Arnould & Evans, and J. Vary, for the appellees.

²⁰⁷ McCLELLAN, J. The present bill is filed by Volfer & Co. and others, as judgment creditors of the O'Bear Jewelry Company, a corporation. Said corporation, R. D. Johnston, the Alabama National Bank, G. S. O'Bear, Jr., W. G. O'Bear, F. C. O'Bear, and W. B. Copeland ²⁰⁸ are made parties defendant. It is made to appear by the bill that the O'Bears and Copeland organized said corporation with a proposed or nominal capital of twenty-five thousand dollars divided into two hundred and fifty shares of one hundred dollars each. Of these G. S. O'Bear subscribed for eighty shares, or eight thousand dollars to be paid by transferring to the corporation a certain stock of jewelry, store fixtures, etc. W. G. O'Bear subscribed for thirty shares, or three thousand dollars, to be paid by transferring to the corporation a lot of miscellaneous jewelry, a list of which was, according to the report of the commissioners, in their hands. Mrs. F. C. O'Bear subscribed for twenty shares, or two thousand dollars, with the privilege of paying for the same by delivering to the company certain gold watches (28) and diamond rings (3). And W. B. Copeland subscribed for twenty shares to be paid in money. The corporation organized in February, 1888, and a report was made to the probate judge's office setting forth that said subscribers for stock had made the transfers of property and the cash payments as provided for in the terms of their respective subscriptions. The bill avers that said Copeland did not and has never paid the two thousand dollars subscribed by him, but still owes the same; that the stock of goods, etc., which was paid to and accepted by the commissioners in satisfaction of G. S. O'Bear's subscription of eight thousand dollars, was not worth more than four thousand, was fraudulently accepted in full payment, and that said G. S. O'Bear still owes the balance of four thousand dollars; that the lot of jewelry with which W. G. O'Bear was to pay his subscription of three thousand dollars, and which was so accepted, was worth only one thousand dollars, and hence that W. G. still owes the balance of two thousand dollars; that Mrs. F. C. O'Bear did not pay the amount subscribed by her either in property or money, and still owes the same. Said G. S. O'Bear and W. B. Copeland were the commissioners appointed by the probate judge to open books of subscription to the capital of said corporation; and the bill charges "that the pretense and representation that said W. B. Copeland had paid his subscription in cash, and that Mrs. F. C. O'Bear had paid her subscription by the transfer of watches and three diamond rings, when in truth no such payments were made, and the excessive ²⁰⁹ valuation of the property transferred by G. S. and W. G. O'Bear, were knowingly

and intentionally made by collusion and agreement among said incorporators, and constituted fraud upon persons who might become creditors of said corporation." The corporation, upon organization, commenced and continued business until December, 1888, or January, 1889, when most of its stock of goods was destroyed by fire, and since then it has not carried on its business. While carrying on its business, the corporation bought large quantities of merchandise, and at the time of the fire had on hand goods amounting in value to many thousand dollars, which were insured to a large amount, and it was agreed that the insurance companies should pay the corporation the sum of seven thousand dollars on account of said loss. At the time of said fire the corporation was indebted to complainants in the several sums stated in the bill, and to divers other persons, including the Alabama National Bank, to which it owed two thousand five hundred dollars, and was then and ever since has been confessedly insolvent, the bulk of its assets, after the fire, consisting of the sums owing it by the insurance companies. The bill further avers: "That for the purpose of preventing complainants and other creditors of said corporation from subjecting said insurance money to the payment of their debts, and to save the same, or as much thereof as possible, to said incorporators, said company assigned and transferred the policies of insurance held by it to the Alabama National Bank before the dispute which had arisen between it and said insurance companies had been settled, and complainants charge that for said transfer there was no consideration, except that said corporation was indebted to said bank in the sum of two thousand five hundred dollars, as aforesaid, and that said bank received in cash on account of said policies a sum not less than seven thousand dollars, and, after appropriating to itself a sufficiency to pay the debt due said bank, it paid over the balance, amounting to the sum of four thousand five hundred dollars, to the persons who composed said corporation, or to some of them, or for their personal account." The bill further avers: "Complainants are advised that said [insurance] money, as well as all the other property of said corporation, was a trust fund, and, after said fire and the insolvency of said corporation, belonged to ²¹⁰ said corporation in trust for the payment of the debts thereof, and that the collection thereof and the payment by said bank of the proceeds to or on account of the individual corporators was a misapplication of said funds for which said bank, which (as your orators charge) knew the insolvent condition of said corporation as well as the said individual corporators, was and is liable to the creditors of said corporation." It is further shown that on September 4,

1889, said corporation appeared in court and confessed judgment in favor of said bank for one thousand and seventy-five dollars on a complaint then filed, and, immediately after the confession and registration of this judgment, the jewelry company executed a general assignment to R. D. Johnston for the benefit of its creditors; and it is charged that said confession of judgment and assignment were parts of one and the same transaction, and should be so decreed and administered; and that said assignee took possession of the property of said corporation, converted the same into money, and out of such proceeds paid said judgment to the bank, and still has a small sum in his hands.

The theory upon which complainants seek relief is thus set forth in the bill: "Complainants are advised that the entire assets of said corporation constitute a trust fund for creditors, and that all persons who in any wise knowingly participate in the unlawful appropriation of said trust fund, or any part thereof, will be required in equity to restore the same. That the subscribers to said capital stock will be compelled to pay the differences between their respective subscriptions and the actual, reasonable value of the property transferred by them in pretended payment thereof. And that such subscribers as have made no payment or transfer of property will be required full payment to make. That said confession of judgment will be held a part and parcel of said general assignment, and said Alabama National Bank will be required to pay the sum received by it in payment thereof, as aforesaid, for the benefit of creditors, and that said bank will be further required to account for the proceeds of the insurance policies received by it as aforesaid, and to restore so much thereof as said bank paid to the individuals composing said corporation or for their use."

The prayer is, that a receiver of the property and effects ²¹¹ of the O'Bear Jewelry Company be appointed and authorized to receive the moneys and effects thereof to which it may be decreed entitled under the allegations of the bill; that said subscribers to the capital stock of said corporation be required to pay to the court the amounts which they respectively subscribed, less the actual reasonable value of such property as they transferred to said corporation; that said Alabama National Bank be required to pay into court, or to the receiver to be appointed, the amount received by it on account of said judgment, as also the sum received by it as the proceeds of the policies of insurance over and above the debt owing it, and that the said assignee, R. D. Johnston, be required to file in court his accounts as such assignee, and to pay into court or to the receiver all moneys in his hands, and to turn

over all property and effects of said corporation; and finally that all the assets thus brought together be administered for the equal benefit of the creditors of said corporation.

The Alabama National Bank demurred to the bill, and among other grounds assigned the following:

1. There is a misjoinder of parties defendant to said bill of complaint in this, that this defendant, alleged to be a preferred creditor, is improperly joined as a defendant with stockholders of the O'Bear Jewelry Company, who are charged with not having legally paid up their subscriptions to the capital stock of the O'Bear Jewelry Company.

2. The said bill of complaint is multifarious in that complainants seek in the same suit to have an accounting of the trust created by the alleged deed of assignment made by the O'Bear Jewelry Company, and to collect unpaid subscriptions of the shareholders of the O'Bear Jewelry Company alleged to be fraudulently withheld.

3. The said bill of complaint is multifarious in that it joins with the claims against the shareholders of the O'Bear Jewelry Company for unpaid subscription claims against this defendant for money alleged to have been improperly paid to this defendant to satisfy a judgment confessed alleged to be part of a general assignment made to R. D. Johnston, for the creditors of said O'Bear Jewelry Company, and money alleged to have been fraudulently received from insurance and fraudulently paid to the individual stockholders of the O'Bear Jewelry Company.

²¹² 4. The said bill of complaint is multifarious in that it seeks to collect unpaid subscriptions to the capital stock of the O'Bear Jewelry Company, and also to settle a trust, and to have this defendant account for money fraudulently paid to the individual shareholders of the O'Bear Jewelry Company.

5. The said bill of complaint is further multifarious in that it seeks a settlement of a trust, and also to set aside a fraudulent disposition of the property of the O'Bear Jewelry Company.

7. This defendant demurs to section 28 of said bill of complaint, for that it is therein alleged that the assets of said O'Bear Jewelry Company constituted a trust fund for the benefit of all creditors alike, when in law the O'Bear Jewelry Company could legally prefer a creditor.

And W. B. Copeland separately demurred to the bill, assigning the following, among other, grounds:

1. There is a misjoinder of parties defendant to the said bill, said Copeland being made defendant with others for the result

of transactions with which the said bill does not show he was connected or any way responsible.

2. The bill is multifarious as to him, because he is by the bill brought in to defend on various matters with a large portion of which the bill does not show he had any knowledge, participation, or connection.

4. There is no equity in the bill, because the bill brings in parties as defendants in regard to matters with which they are not connected, and the relief sought is not the same against all of the defendants.

The chancellor overruled these, as well as all other, assignments of demurrer, and from his decree in that behalf this appeal is prosecuted.

As we have seen, it is expressly averred in the bill itself that the theory upon which alone complainants seek relief is, that the assets of the O'Bear Jewelry corporation constitute a trust fund or estate, that said corporation was the trustee thereof, and the complainants and the other creditors were the cestuis que trust thereof, and that the chancery court, by virtue of its general jurisdiction over trust estates, was competent to take charge of this fund upon the invocation of such cestuis que trust, restore and protect it by collecting moneys belonging to it from all sources, however diverse and dissociated ²¹³ with each other they might be, and to ultimately settle the trust by dividing the fund ratably among the beneficiaries.

The respondents, by their demurrers, insist that said assets do not constitute a trust fund in the sense necessary to the maintenance of the bill, exhibited, as it is, against parties who have nothing, and are not chargeable with any wrong, in common, but whose acts, claims, and attitudes in respect of and toward the corporation are entirely distinct and independent; and hence they say that the bill is multifarious. And in the arguments submitted in this court the decree below is attempted to be supported solely and expressly upon this theory of the spoliation of a trust estate. So that the main, if not only, question presented on this appeal is, whether the assets of an insolvent corporation constitute a trust fund for its creditors in the proper and essential meaning of those terms.

This whole idea, that the property of insolvent corporations is held by them in trust for creditors—is a trust estate in their hands—and to be administered by chancery as such, originated in a dictum of Judge Story in *Wood v. Dummer*, 3 Mason, 308. It had no existence at common law, and has none to this day in

the law of England; but is distinctly a creation of some courts in this country, and known in jurisdictions where it obtains as the "American doctrine." This court has quite recently adopted it, and held in the cases of *Corey v. Wadsworth*, 99 Ala. 68; 42 Am. St. Rep. 29; *Goodyear Rubber Co. v. Geo. D. Scott Co.*, 96 Ala. 439, and *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, that the assets of an insolvent corporation is impressed with a trust in the hands of the company, in favor of its creditors first, and then in favor of its stockholders. The present writer dissented from the opinion and conclusion of the court in each of those cases. To his mind, there is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relation to the creditors of such corporation as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership; and is or is not to be impressed with a trust character upon the same circumstances and under the same conditions in the first case as in the latter two. Within the limits of its charter, ²¹⁴ every corporation authorized to hold and dispose of property at all, is entitled, and this generally by the very terms of the statute creating it, to hold and dispose of it as a natural person might hold and dispose of it under the laws of the land. As said by Judge Bradley, in *Graham v. Railroad Co.*, 102 U. S. 148: "In law, a corporation is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same." An individual not indebted may give his property away, provided the gift is not actuated by a purpose to defeat future creditors. So can a partnership. And so, also, undoubtedly can a corporation, if the gift would not be violative of its charter. An individual owing debts, but solvent, cannot give away his property to the prejudice of existing creditors. Neither can a partnership, nor a corporation. An insolvent individual and an insolvent partnership may—or might have before the act of 1892-93—sell and convey all of his or its property to one creditor in payment of his debt, the valuation being fair, the price adequate, and no benefit being reserved to the debtor. And so, as expressly ruled by this court in *Goodyear Rubber Co. v. Geo. D. Scott Co.*, 96 Ala. 439, and *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, following the decisions in other states where this "American doctrine" obtains, may an insolvent corporation sell and convey all its property or apply all its assets to the payment of one creditor leaving nothing for others. Was such a disposition of a trust

estate ever permitted by any court in any land under any system of jurisprudence? I am unable to conceive of it. Certain things have heretofore been generally supposed to be essential to trust estates. There must be property held in trust. There must be a trustee, or the chancery court in the place of a trustee. There must be beneficiaries—cestuis que trust. The property belongs in equity to the cestuis que trust, they are beneficially interested in it or entitled to it. The legal title is in the trustee. Now when the beneficiaries constitute a class and take, or are entitled in equity to take, the property held in trust as members of a class, such as the heirs of A B, or the legatees named in the will of C D, or as creditors, nobody, except the votaries of this "American doctrine," has ever supposed that one member of the ²¹⁵ class, all members of which are equally interested in the trust property, would be entitled at the election of the trustee to take the whole estate. This is at war with all essential notions of trusts and equitable jurisdiction and administration of them. It may be argued, however, that these decisions are wrong in this particular, but sound in respect of the declaration that the property of insolvent corporations is trust property. But the decisions are not wrong in this particular; the soundness of the proposition they assert has long been recognized by this court: *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Goodwin v. McGehee*, 15 Ala. 232. Given the power, which cannot be denied, to hold and dispose of property as an individual, and the well-settled doctrine in this state, and, generally, that the insolvent individual may transfer all his property in payment of one or more, to the exclusion of all other, debts, it follows in a logical sequence, which nothing but the illogical exercise of the sheer power of courts of last resort can break, that an insolvent corporation may in like manner prefer one creditor to the exclusion and defeat of all others. With this undoubted power in the corporation or its officers, it would seem to be most manifest that neither the corporation nor its officers could possibly sustain the relation of a trustee to other creditors in respect of corporate assets, which they are under no duty at law or in equity to administer for the benefit of those who are called the cestuis que trust.

But apart from this consideration, which indeed was not in my mind when I felt constrained to dissent in the first of the cases on the question decided by this court, viz., *Corey v. Wadsworth*, 99 Ala. 68, 42 Am. St. Rep. 29, I cannot, upon well-settled and elementary general principles and definitions, see my way to an acceptance of this so-called doctrine. All trusts are of two kinds, expressed and implied. It is, of course, nowhere pretended the

relations between an insolvent corporation and its creditors constitute an express trust. All implied trusts are of two kinds, resulting and constructive. "Resulting trusts," says Mr. Pomeroy, "arise where the legal estate is disposed of or acquired, not fraudulently or in violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the ²¹⁶ beneficial interest is not to go with the legal title": 1 Pomeroy's Equity Jurisprudence, sec. 155. And they are said to arise under the following several states of fact: 1. Where the purchaser of an estate pays the purchase money, and takes title in the name of a third person; 2. Where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; 3. Where an estate is conveyed upon trusts which fail, either in whole or in part, or are not declared, or are illegal; and 4. Where a conveyance is made without consideration, and it appears from the circumstances that the grantee was not intended to take beneficially: 10 Am. & Eng. Ency. of Law, 4, 5. It requires no discussion to the demonstration of the impossibility of referring this "American doctrine" of trusts for corporation creditors to the head of resulting trusts.

All constructive trusts are of three kinds, or arise from one or the other of three conditions of fact: 1. Trusts arising from actual fraud; 2. Trusts which arise from constructive fraud; and 3. Trusts that arise from some equitable principle independent of the existence of fraud: 10 Am. & Eng. Ency. of Law, 60. As there is no fraud, actual or constructive, involved in the naked fact that a corporation is insolvent—has creditors which it is without assets to pay in full—and this fact is the base for all the superstructure of this doctrine of trust for its creditors, it cannot be conceived, and, I suppose, has never been contended, that such trust is referable to either the first or second heads of constructive trusts. And it is the conclusion of so high an authority as Mr. Pomeroy, that the third classification of constructive trusts stated above has no existence dissociated from actual and constructive fraud. It is his opinion "that all instances of constructive trusts, properly so called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not involved, simply because

it is not absolutely necessary under the circumstances; the existence of the trust might, in all cases of this class, be referred to constructive ²¹⁷ fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud"; 2 Pomeroy's Equity Jurisprudence, sec. 1044. If this view be adopted, the relation between an insolvent corporation and its creditors is excluded from every possible category of constructive trusts, for the reason, or by virtue of the fact, that that relation involves no fraud whatever; and as that relation is, as I have seen, the sole ground for the doctrine of trusts in cases like this, the doctrine is unsound, unsupported in principle or reason, and should not be upheld by any court.

But if we adopt the view first stated above, that constructive trusts may arise by force of some equitable principle independent of the existence of fraud, actual or constructive, and which seems also to be the opinion of Mr. Perry (1 Perry on Trusts, sec. 168), the same conclusion is equally inevitable. Eliminating the element of fraud from the consideration, there still remains as an essential predicate for the existence of a trust by construction of law, some unconscientious conduct on the part of the person to be held as trustee in invitum, or some unconscionable result through means or under circumstances which bring the transaction within some recognized title of equity jurisprudence, as, for instance, where a tenant in common buys in an outstanding term for his own benefit, he is trustee for his cotenant, and where a conveyance has been made through ignorance, accident, or mistake, the grantee will be the trustee in a constructive trust for the grantor. Thus, wherever one is placed in such relation to another that he becomes interested with or for him in property or business, he is prohibited from acquiring rights in that property or business antagonistic to the person with whom he is associated, as, for illustration, if one partner, or other person occupying a fiduciary relation, renew a lease theretofore held by the partnership, or by the person renewing and another in confidential relation to him, in his own name and with his own funds, he will be a trustee for his associate by construction of law. And so, where by accident, ²¹⁸ ignorance, or mistake more land is embraced in a conveyance than was bargained and sold, a constructive trust

arises in favor of the grantor for the excess: 10 Am. & Eng. Ency. of Law, 80.

But in all these cases, in all cases of constructive trusts where it is said by some authorities chancery proceeds without regard to fraud, relief is granted upon some acknowledged ground of equitable jurisdiction, and administered by holding the wrongdoer to account as a trustee. There must be a confidential relation and unconscientious conduct on the part of one party to, and in abuse of, that relation, or there must be some ignorance, accident, mistake, or the like, against the unconscionable consequences of which equity will, on general principles, grant relief, else there can be no constructive trust.

That the relation of debtor and creditor is not of a confidential character there can, of course, be no doubt. 'Tis absurd to say that the creation of that relation involves aught of accident, mistake, or ignorance. That a debtor has property of his creditor which in equity and good conscience belongs to the creditor, because the debt contracted in its sale has not been paid, there is no warrant for saying. Equally unwarranted is the idea that in equity all the property of a debtor who has become insolvent belongs to the creditor, and is held by the debtor in trust for him. And this idea of ownership in the cestui que trust underlies the whole doctrine of trusts of every description. In all trusts the legal title is in one, the equitable ownership in another. A mere debt against one who has property, whether solvent, or insolvent, is not ownership, nor is a right to charge a fund, or a lien upon it, the beneficial ownership of it. Confessedly, the property and assets of a solvent corporation do not constitute a trust fund for its creditors. Can it be possible that the mere passing of a corporation from a state of solvency to a state of insolvency amounts to a declaration of an express trust for creditors, or to a resulting trust upon the theory that title to the assets of the concern should have been made to the creditors? Or is it conceivable that this mutation from the one condition to the other does violence to a confidential relation which never existed, and hence is a constructive trust? Or that this mere change of inherent conditions is the vestiture in the corporation, through the ignorance ²¹⁹ or mistake of the creditor, or through mistake, or through fraud, of a greater title, or title to more property than was contemplated and intended, when before the change, confessedly, the corporation had the absolute and indefeasible title free from all trusts to all its property and assets, and when the change itself involves nothing of fraud, of abuse of fiduciary relations, of ignorance, or mistake or accident? The

learned judges who uphold this "American doctrine" may find something in these conditions of fact upon which to construct a trust, but I confess my utter inability to follow their arguments or to see with their eyes. Nothing is clearer to my humble judgment than that the insolvency of a corporation—the existence of a corporation with property and debts, the property being insufficient to pay the debts—is not within any definition of any trust known to equity jurisprudence. The creditors of such corporation have the same rights against it as they have against an insolvent partnership, or an insolvent individual, debtor and no other or more. They do not at law or in equity own the property of the one or the other; but the property of each is a fund for the payment of debts in the sense that neither can give it away, or dispose of it with intent to hinder, delay, or defraud creditors. The property of the individual cannot be appropriated to his own use, to the exclusion of his creditors, under any cover whatever. The property of the partnership cannot be appropriated to the personal use of the partners, or in payment of the debts of the individuals composing the firm, to the exclusion of partnership creditors, under any pretense whatever. And so the property of the corporation cannot be diverted to the use of the stockholders, to the exclusion of creditors, under any circumstances whatever. The powers and limitations upon the powers of an insolvent corporation to deal with its property are precisely the same in all essentials as the powers and limitations upon the powers of insolvent individuals and insolvent partnerships. The estate of the debtor in each class is essentially the same—the corporation, no less than the individual and the partnership, is at law and in equity the owner of its property. The rights, remedies, and estates of creditors of each are also the same. They do not own the property of their corporation debtor, or any ²²⁰ interest in it, in equity or at law, any more than they own the property of their individual or partnership debtor. Their right against each is the same, to have their debts paid out of the property, but this right is not that of a cestui que trust, but, whether the property is corporate or individual or partnership, it is the right of a creditor simply. Confessedly, even this right may be defeated as to any particular creditors by a sale of the property in payment of another creditor, or by its being taken on execution in favor of another, or even by its sale by the debtor—corporation, individual, or partnership—to a third person, and this although such purchaser have notice of the insolvency of the debtor. All which, as I have seen, would be impossible if the property constituted a trust estate, with the corporation as trustee and the

creditors as cestuis que trust, for in such case all who take with notice of the insolvency would take subject to the trust and themselves be held as trustees in invitum.

Not only are the rights of individual, partnership, and corporation creditors the same against their insolvent debtors' estates, and each different in the same way from the rights of cestuis que trust, but the remedies of a corporation creditor, in the absence of a statute, are precisely those of a creditor of an individual or partnership. The remedy of each class of creditors may, upon a given state of facts, be in equity; but when this is so, it is not because of any supposed trust, but upon some recognized ground of equity jurisprudence, as where the debtor has fraudulently transferred his or its property, and chancery is invoked to set aside the transfer and subject the property. And when chancery has thus assumed jurisdiction, it will administer the estate for the equal benefit of all creditors before it, and to that end the court becomes a sort of trustee sub modo, in the administration of the property, but not with any reference to the character of the estate, as being held in trust or otherwise, before and at the time jurisdiction attached.

Not all the publicists and courts in this country, nor the ablest of them, countenance this so-called American doctrine. Mr. Pomeroy expressly repudiates it. He says: "In applying this principle [of constructive trusts], care should be taken to distinguish between actual trusts and those relations which are only trusts by ²²¹ way of metaphor; between persons who are true trustees holding the legal title for a beneficial owner, and those who simply occupy a position which is analogous in some respects to that of a trustee. The use of these terms to designate relations and parties which have no essential element in common with actual trusts and trustees can only produce confusion and inaccuracy. . . . There are certain relations which are spoken of as trusts, and as constituting a species of constructive trusts, but which are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor. Since they lack the element of fraud, they do not, in any view, properly belong to the division of constructive trusts. . . . The survivors of a partnership are called trustees for the estate of the deceased partner, with respect to his share of the firm property. This expression is mostly metaphorical; there is certainly nothing in the relation resembling a constructive trust. Extending the analogy still further, courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of cred-

itors, and the capital stock and other property of private corporations, especially after their dissolution, is treated as a trust fund in favor of creditors. These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of individual partners or corporators, and that the creditors have a lien upon it for their own security; but it is plain that no constructive trust can arise in favor of the creditors, unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property, and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means." And in a note to the above text the learned author says: These "cases are not constructive trusts, and are mentioned simply for the purposes of completeness, and to distinguish between correct and mistaken conceptions": 2 Pomeroy's Equity Jurisprudence, secs. 1044, 1045.

And the highest and ablest court in the land, the supreme court of the United States, has quite recently gone ²²² over this whole subject, considered exhaustively all its own decisions and dicta upon it, and, in an able opinion by Mr. Justice Brewer, repudiated the idea that the property of an insolvent corporation is a trust fund or estate held by the corporation or its officers for creditors as *cestuis que trust*. Judge Brewer quotes the language of Judge Bradley in *Graham v. Railroad Co.*, 102 U. S. 148, to the effect that when a corporation becomes insolvent, a court of equity, at the instance of proper parties, "will then make its funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his," and says of that case that "all that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself." And he proceeds further on to say: "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder"; and he concludes his opinion upon this subject as follows: "The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in prefer-

ence to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property. Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien, or a direct trust. A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary ²²³ capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon": *Hollins v. Briarfield Coal etc. Co.*, 150 U. S. 371, 381-386.

The supreme court of Minnesota, in an able opinion by Mitchell, justice, also repudiates this idea that the property of an insolvent corporation is a trust fund. Of it it has this to say: "This 'trust fund' doctrine, commonly called the 'American doctrine,' has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two-thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding billholders. Upon old and familiar principles, this was a fraud on creditors.

Evidently, all that the eminent jurist meant by the doctrine was, that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders—a proposition that is sound, upon the plainest principles of common honesty. In *Fogg v. Blair*, 133 U. S. 534, 541, it is said that this is all the doctrine means. The expression used in *Wood v. Dummer*, 3 Mason, 308, has, however, been taken up as a new discovery, which furnished ²²⁴ a solution of every question on the subject. The phrase that 'the capital of a corporation constitutes a trust fund for the benefit of creditors' is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further": *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; 31 Am. St. Rep. 637, 641, 642.

The supreme court of Michigan is equally pronounced against this "trust fund" doctrine, and in support of the right of a corporation, solvent or insolvent, to hold and deal with its property precisely as if it were an individual. That court, in an opinion by Montgomery, J., says: "Nor is it the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the stockholders or directors. We are aware that the decisions in the various states are not uniform as to the question, and that a number of very eminent text-writers have deprecated a state of the law which admits of such preferences. But, to adopt the language of Dillon, J., in *Buell v. Buckingham*, 16 Iowa, 284, this condition of the law 'may constitute a good legislative reason for giving pro rata to outside creditors, but the legislature must furnish the remedy.' In the case referred to, it was held that being an officer of the corporation did not deprive Buell of the right to enter into competition with the other creditors, and run a race of diligence with them: See, also, *Hal-lam v. Indianola Hotel Co.*, 56 Iowa, 179; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461; *Smith v. Skeary*, 47

Conn. 54; Catlin v. Eagle Bank, 6 Conn. 233; Central R. R. etc. Co. v. Claghorn, 1 Spear Eq. 545; Planters' Bank v. Whittle, 78 Va. 739; Leavitt v. Oxford etc. Min. Co., 3 Utah, 265; ²²⁵ Whitwell v. Warner, 20 Vt. 444; Holt v. Bennett, 146 Mass. 437; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Wilkinson v. Bauerle, 41 N. J. Eq. 635. The rule in this state has, we think, been established since the case of Town v. Bank, 2 Doug. (Mich.) 530, that a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence that the assets do not become a trust fund for pro rata distribution among all its creditors, until such time as steps are taken under the 'Winding Up Act,' chapter 282, of Howell's Statutes. This is the substance of the rule stated in both Town v. Bank, 2 Doug. 530, and Turnbull v. Prentiss Lumber Co., 55 Mich. 387. And in the later case of Kendall v. Bishop, 76 Mich. 634, a mortgage had been given to secure the directors of the corporation, and to secure paper upon which they were indorsers. The question under consideration was fully discussed in the briefs of counsel, and it was said by Justice Campbell: 'There seems to be no reason why one honest creditor should be on a worse footing than another, and we do not find in our law any such distinction': Bank of Montreal v. Potts etc. Lumber Co., 90 Mich. 345. And to like effect are the cases cited in the foregoing quotations."

In line with this view, Judge Caldwell, in Gould v. Little Rock etc. Ry. Co., 52 Fed. Rep. 683, said: "It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts, but this rule means no more than that the property of a corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of the corporation is applied to the payment of any of its bona fide debts."

Other authorities might be collated on the question under consideration and in support of the view I have taken of it; but the foregoing will suffice, it is thought, for the purposes of this opinion. Upon them, and by the force of the elementary principles of trust estates, I am impelled to the conclusion that the property of an insolvent corporation is not a trust fund or estate, accurately speaking, or in any sense other than that when ²²⁶ the chancery court takes possession and control of such property upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be

administered for the equal benefit of creditors. It follows that the bill cannot stand against the demurrers for multifariousness, unless that objection can be met upon some other consideration than the trust character of the corporation property and assets, which is alone and expressly, both in the averments of the bill itself and in the argument of counsel, relied on to support the decree overruling the demurrers. I do not think the objection can be met upon any other ground. There is no connection between several of the matters brought forward by the bill, and the defendants attempted to be charged in respect of some of these matters have no interest whatever in others. For instance, the Alabama National Bank did not participate in the wrongs committed upon the corporation in respect of the subscriptions to its stock by the O'Bears and Copeland, and it is not interested in the present effort to right those wrongs. Again, the bill seeks the settlement of the trust created by the assignment to R. D. Johnston and to compel the bank to pay into court money which it owed the corporation, or held belonging to the corporation, and paid over to the stockholders of the corporation, which constituted no part of, and had no connection with, the assignment to Johnston. And equally dissociated is the effort of the bill to have an accounting by the assignee from its purpose to collect unpaid subscriptions from stockholders. And so in respect of the purpose of the bill to have the judgment in favor of the bank declared a part of the assignment and to have the bank refund the amount it received in satisfaction thereof: this claim is wholly foreign to the relief sought against the bank as to the insurance money paid to the O'Bears and Copeland, and also to the relief sought against the subscribers to the stock. In other words and in brief, the bill, in my opinion, stands upon the same plane in respect of multifariousness as if it had been filed against an insolvent individual debtor, who was wasting or fraudulently disposing of his property, and against his assignee for the benefit of creditors, a creditor to whom he had confessed judgment which his assignee had paid as a lien on the property assigned, against a person who, ²²⁷ having assets of the insolvent debtor in his hands, had paid the same to third persons so they could not be reached by creditors, and against other persons who, in equity, owed money to the debtor defendant. In such case—and no more in this—there would be no relation or connection between the defendants, or the rights asserted against them respectively either in the character of their wrongs or defaults, or in the character of the estate they had despoiled; and recovery against each would be had, if allowed at all, not upon any idea of conserving

a fund which the court, because of its trust character, had the right to protect and restore, but solely as enforcing several money demands from several defendants in one and the same action, in which also the trustee in the assignment would be brought to account on considerations and in respect of matters with which the claims against some of the other defendants had no connection.

In preparing the foregoing opinion, the writer assumed to express his individual views only because of decisions of this court referred to above which take a different view as to the assets of an insolvent corporation being a trust fund. This opinion has now, however, been concurred in by my associates, and stands as the opinion of the court. The cases of *Corey v. Wadsworth*, 99 Ala. 68; 42 Am. St. Rep. 29; *Goodyear Rubber Co. v. Geo. D. Scott Co.*, 96 Ala. 439; and *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, in so far as they are inconsistent with the views and conclusion we now express, are overruled.

The decree overruling the demurrers for multifariousness is reversed, and a decree will be here entered sustaining said assignments of demurrer.

Reversed, rendered, and remanded.

COLEMAN, J. In the case of *Corey v. Wadsworth*, 99 Ala. 68, 42 Am. St. Rep. 29, the facts were that Corey, a director and the president of the Building Supply Company, a corporation, became, with other officers, bound as guarantor of a debt of six thousand dollars due from the corporation to the Exchange Bank; that the corporation became insolvent, and, under these circumstances, the corporation sold and conveyed to Corey a large amount of its assets, exceeding in value the amount of the debt due the Exchange Bank, in consideration that Corey would pay the ²²⁸ debt of the insolvent corporation, for which he was already bound. The bill was filed to set aside and annul as fraudulent and void the sale and transfer of the property under the circumstances stated. The case was brought before us by appeal from the ruling of the chancery court overruling a demurrer to the bill. The real question presented by the appeal was, whether an insolvent corporation, acting through its governing board, can sell and transfer its assets to a member of the governing board (in this case a director and its president), in satisfaction and payment of an unsecured debt due from the insolvent corporation to such member, and thus give him a preference over other creditors of the insolvent corporation. This, as I understand the case made by the bill, was the real question of merit, which called

for an adjudication by this court. Much was said in the opinion of the court unnecessary to a decision of the question, and which should be regarded as dicta. So far as the conclusion of the court held that the transaction as averred in the bill was fraudulent and void against its creditors, in my opinion, it was correct; and I do not understand the opinion in the case at bar to militate against the principle of law reached in the conclusion of *Corey v. Wadsworth*, 99 Ala. 68, 42 Am. St. Rep. 29, which was necessary to a decision of the case.

The case of *Goodyear Rubber Co. v. Geo. D. Scott Co.*, 96 Ala. 439, though published earlier, in fact was rendered subsequent to that of *Corey v. Wadsworth*, 99 Ala. 68, 42 Am. St. Rep. 29, decided but one question, and that was "that the transfer by a director and managing officer of an insolvent corporation, without authority of the board of directors, of all its property, in consideration of a debt of the corporation for which he was liable as guarantor or indorser, or joint maker of a note given therefor, is invalid as to other creditors, being in effect a preference of himself." I do not understand the case at bar to combat the soundness of the rule declared in this case. In the opinion of *Goodyear Rubber Co. v. Geo. D. Scott Co.*, 96 Ala. 442, it is said: "We did not, however, go to the length of holding [in the case of *Corey v. Wadsworth*, 99 Ala. 68, 42 Am. St. Rep. 29] that directors of an insolvent corporation are so completely hampered by the trust relation they sustain as to disable them from paying or securing some creditors in preference to and at the expense of others to whom the corporation is indebted. . . . 229 The great weight of authority is the other way, and we are not inclined to run counter to them." The same rule was declared in *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357.

I do not understand the case at bar to overrule any principle of law decided in either of the foregoing cases, which were necessary to a decision of those cases, but that these cases are overruled only so far as the opinion stated that the assets of a corporation became a trust fund for the benefit of creditors, and were placed beyond the power of disposition or control of the governing board, whenever and as soon as the corporation became insolvent, and that insolvency of the corporation alone gave a court of equity jurisdiction to administer the assets as trust property. Such statements were dicta, and do not express the opinion of the court.

CORPORATIONS — INSOLVENCY — PREFERENCES.—Though a corporation has become insolvent and its liability greatly exceeds its assets, if it continues to be a going concern and conducting its

business in the ordinary way, its assets are not trust funds for equal distribution among its creditors, so that it has not power to make preferences to some such creditors: *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634; 49 Am. St. Rep. 943, and note. A corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another: *Schufeldt v. Smith*, 131 Mo. 280; 52 Am. St. Rep. 628; *First Nat. Bank v. Dovetail Body etc. Co.*, 143 Ind. 550; 52 Am. St. Rep. 435, and especially note. See, also, the extended note to *Conover v. Hull*, 45 Am. St. Rep. 826.

ANNISTON PIPE WORKS v. WILLIAMS.

[106 ALABAMA, 324.]

EXECUTION SALES—PLACE OF SALE.—If a county has two courthouses, at each of which are situated courts of coequal and co-ordinate powers and jurisdiction, an execution sale of real estate may be made at either courthouse, under a statute providing that such sales must be made at the "courthouse of the county."

EXECUTIONS—SALES EN MASSE.—If two or more distinct parcels of land are to be sold under execution, the officer making the sale must sell them, separately, unless special circumstances are shown making it clear that they will bring more or that the sale will be more advantageous if they are offered for sale together, and if, in disregard of his duty, the officer sells them in a lump, as one parcel, the sale may be set aside on seasonable application.

EXECUTION SALES—MOTION TO SET ASIDE—TIME.—No inflexible rule as to the time within which a motion to set aside an execution sale must be made can be announced, and its seasonableness must be determined by the circumstances of each particular case. A motion to set aside an execution sale of land made within two years after the sale is seasonably made, if, in the mean time the property has remained unchanged and nothing has occurred prejudicially affecting the relations of the purchasers to it.

COURTS—CONTROL OVER PROCESS.—Although a court of law has complete control over its process to prevent abuse and injustice, yet circumstances may arise in the execution of such process which render it incompetent to administer full relief to the party seeking its aid, or to protect from injustice and injury the rights of others which have intervened. In such cases, resort must be had to equity.

EXECUTION SALES—MOTION TO SET ASIDE—EQUITY JURISDICTION.—If, upon a motion in a court of law to set aside an execution sale of land under process issuing therefrom, it appears that the sheriff has executed his deed and the purchaser has taken possession and paid off taxes and other liens which should be refunded or secured to him, the motion cannot be granted, and relief can be obtained only in a court of equity.

Motion to set aside an execution sale of lands, on the grounds that they consisted of several distinct parcels and were sold en masse for a gross sum much less than their actual value, and were sold at a place not authorized by law, and were insufficiently described in the levy and notice of sale. The court below granted the motion, and an appeal was taken from such ruling.

Knox, Bowie & Pelham, for the appellants.

Caldwell, Johnson & Acker, and J. Carthel, for the appellees.

³³¹ HARALSON, J. 1. Section 2907 of the code provides, as to the sale of real estate under execution, that "lands when levied upon under execution from any court of record, must be sold on any Monday in the month, at the courthouse of the county." It is not denied that if there were but one courthouse in Calhoun county, the sale of the land in question, to be legal, must have been made at that place. There is high authority for holding that where the statute prescribes the place where real estate is to be sold under execution, it is imperative and mandatory, and a sale at any other place would be void: Herman on Executions, sec. 200; Freeman on Executions, sec. 289; Rorer on Judicial Sales, sec. 779; Howard v. North, 5 Tex. 290; 51 Am. Dec. 769; Grace v. Garnett, 38 Tex. 156; Koch v. Bridges, 45 Miss. 247.

Jacksonville is the county seat of Calhoun county, and a courthouse of the county is located there. The act establishing the city court of Anniston clothed the judge and court thereof, within the precincts of the county designated, including the city of Anniston, with the same powers, authority, and jurisdiction as circuit judges and chancellors, and circuit and chancery courts have and exercise: Acts 1888-89, p. 564. It is provided therein "that said court shall be held, and the office of said clerk (of the court) and the records thereof shall be kept, at such place in the city of Anniston as may be provided by the court of county commissioners of Calhoun county"; the grand and petit jurors for said court are drawn by the jury commissioners of said county; the sheriff of the county is made the executive officer of that court in all respects as he is of the circuit and chancery courts; the fines and forfeitures accruing in said court are paid into the county treasury, and the salary of the judge is paid by the county. It thus appears that said court is a part of the machinery for the administration of justice in said county, of co-equal and co-ordinate powers and authority with the circuit and chancery courts therein, and that its records, proceedings, and courthouse, appertain to judicial proceedings in and belonging ³³² to the county, in the same sense and degree as do those of the circuit and chancery courts. It may be said, therefore, that Calhoun county has two courthouses, one in Jacksonville and one in Anniston, and that sales of real estate sold at the courthouse in Anniston are sales at the courthouse of the county, within the meaning of said section 2907 of the code.

2. The sale in this case was made in bulk, of a large quantity

of real estate in the city of Anniston. It included the interest of the defendant, Williams, in execution, in about twenty-seven acres lying between certain designated boundaries, laid off, as appears from the map, into about one hundred and thirty lots, with three blocks remaining not subdivided. Another part of the levy and sale included all claim of the said Williams in sections 5, 6, 7 and 8, in township 16, range 8 in Calhoun county, which we infer from the map submitted, and from the arguments in the cause, embrace four square miles, covering a large part of the residence and business portions of the city of Anniston, with many hundred blocks subdivided into lots; and besides, there is a very large number of lots and blocks, too numerous for one to venture, without counting very particularly, to number with accuracy; and with such inaccuracy of description, the whole property, or defendant's interest in it, was offered and bid off by the receiver of the appellant, the Anniston Pipe Works, in mass, for seven thousand and twenty-six dollars and twenty-five cents, to satisfy several executions against the defendant, Williams. It was agreed, and the sheriff's deed recites the fact, that that amount of money was paid to the sheriff, in consideration of which he executed a deed to the property to the purchasers, August 16, 1892. What was the aggregate of the several executions under which the property was sold does not appear, but it is shown that two of the four executions—the ones in favor of the First National Bank of Anniston, and the Birmingham Trust and Savings Company, each of which were prior liens—were paid in full, together with the sheriff's costs and commissions for making the sale, and the sheriff was directed to enter upon the execution in favor of the Anniston Pipe Works, the appellant, against the defendant, W. H. Williams, a credit for the balance of the amount of said purchase money.

³³³ In respect of sales in mass, Mr. Freeman says: "Where several distinct parcels of real estate or several articles of personal property are to be sold, what is called a 'lumping sale' can rarely be justified. Such a sale, when objected to in due time, will not be upheld, unless special circumstances can be shown from which it must be inferred that such sale was either necessary or advantageous. It is sometimes said that such a sale will not be vacated until it is shown to have injured someone. But when two or more distinct lots are to be sold, the officer should always endeavor to sell them separately, unless it is clear that they will bring more, if offered together. If, in disregard of his duty, he should sell them in a lump, as one parcel, the sale will be set aside, on a seasonable application": Freeman on Executions, sec. 296.

Holding to the same view, Mechem gives as its reason, "that no greater amount shall be sold than is necessary to satisfy the execution; and it increases competition: many persons may desire to purchase a lot or parcel who would not or could not purchase several or the whole quantity levied on, and where by statute a debtor is allowed a certain time for redemption, by selling in parcels, the price of each lot is definitely fixed, thereby enabling him to redeem any portion of the property sold": Mechem on Executions, sec. 222; Rorer on Judicial Sales, sec. 730; 12 Am. & Eng. Ency. of Law, 214, 215, and authorities cited in each; Wheeler v. Kennedy, 1 Ala. 292; Jones v. Davis, 2 Ala. 730; Mobile Cotton Press etc. Co. v. Moore, 9 Port. 679-692; Klopp v. Witmoyer, 43 Pa. St. 219; 82 Am. Dec. 563; Nesbitt v. Dallam, 7 Gill & J. 494; 28 Am. Dec. 236.

Two witnesses for the movants swore, the one that the property sold was worth at the time, one hundred and sixty-eight thousand dollars, and the other that it was worth one hundred and fifty-eight thousand two hundred and seventy-five dollars. The five witnesses for the appellant swore that the price at which it was bid off, when all the circumstances were considered, was fair. But, without reference to the adequacy of the amount bid, there can be no doubt that the defendant has presented a case, if his application does not come too late, when, under proper proceedings, the sale should be set aside.

3. As to the time within which a motion to set aside ³³⁴ a sale of land under execution must be made, we have repeatedly held that no inflexible rule has been or can be announced. There should always be promptness in making such a motion, the reasonableness of which is to be determined by the particular circumstances of each case. The question of laches, when involved, must be determined on equitable principles: Bolling v. Gantt, 93 Ala. 90; Ponder v. Cheeves, 90 Ala. 117; Cowan v. Sapp, 74 Ala. 44. In the case in hand, the application was made inside of two years after the sale. The property remained unchanged, meantime, so far as appears; and we fail to discover any thing as affecting the property itself, and the relation of the purchasers to it, which would make it injurious or prejudicial to them, as for any delay that has occurred, for the motion to set aside the sale to be granted, under proper conditions, and much that may come to defendant if the sale is not set aside.

But how can a court of law deal with such a case as we have before us? The general rule is, that a court of law has complete control over its processes, to prevent abuse and injustice; but circumstances may arise in the execution of the orders or processes

of a law court, which, on account of its fixed rules, render it incompetent to administer full relief to a party seeking its aid, or to protect from injustice and injury the rights of others which have intervened. On the motion of the movants and the proofs introduced, it is evident that the sale should be set aside; but, from the answer to the motion and the evidence introduced, it appears that the sheriff has executed a deed to the purchasers of the lots in question, which a court of law has no power to annul, and that the purchasers have rightfully paid out considerable sums of money in paying taxes and removing liens on the property, which should be refunded or secured to them. It would be manifestly inequitable, and contrary to well-established rules on the subject, to set aside the sale, without refunding to them the money they have paid out, and placing them in statu quo. These facts give rise to questions of law which can be properly determined only in a court of equity, and which must be adjudicated before the movants are entitled to have the sale set aside: *Cowan v. Sapp*, 81 Ala. 525; *Ray v. Womble*, 56 Ala. 32; ³³⁵ *Littell v. Zuntz*, 2 Ala. 256; 36 Am. Dec. 415; *Day v. Graham*, 1 Gilm. 446; *Wimberly v. Mayberry*, 94 Ala. 255; *Jenkins v. Merriweather*, 109 Ill. 647; *State Bank v. Noland*, 13 Ark. 299; 2 *Freeman on Executions*, sec. 310.

4. As applicable to this case—if it should require further litigation in equity to reconcile differences the parties themselves are so competent to adjust—we refer to the conclusions expressed in *Ray v. Womble*, 56 Ala. 32, that the purchaser in that case was entitled to the purchase money; and if it had been applied to the satisfaction of the execution, the decree vacating the sale should secure it to him, with interest; that it was not essential for the complainant to offer in his bill to refund the purchase money; that the sale was compulsory, distinguishable from that class of cases in which a complainant, seeking the rescission of a contract because of fraud or mistake, must offer to place the party with whom he dealt in statu quo, before a court of equity will be active for his relief; that a resale was the right of complainant, though he was unable to pay the purchaser the money he had expended; and that the court, in decreeing the vacation of the first sale, and ordering a resale, if necessary, because of the inability of the complainant to refund the purchase money, would, of course, fully protect the purchaser; but that it could not be tolerated that a judicial sale, tainted with fraud, or a breach of official duty, oppressive and grossly unjust to an unfortunate debtor, should be permitted to stand, because of the debtor's inability to refund the purchase money.

For the reasons assigned, we must hold that the court of law was not competent to make the order it did in setting aside this sale. The defendant must seek a remedy in another forum, if he finds it necessary to do so. The judgments of the court are reversed, and the causes remanded.

Reversed and remanded.

McClellan, J., dissenting.

EXECUTION SALE EN MASSE, when the property is susceptible of division and a smaller portion would, if offered, have satisfied the debt, is irregular and the sale will be set aside in equity: *Smith v. Huntoon*, 134 Ill. 24; 23 Am. St. Rep. 646, and note. An execution sale will be vacated because several parcels of real property were sold in a lump, on motion of the defendant, unless the purchaser can show that the sale in that mode has not interfered with the defendant's right of redemption: *Power v. Larabee*, 3 N. Dak. 502; 44 Am. St. Rep. 577, and note. When property, susceptible of division, is sold under execution en masse for an inadequate price, without being first offered in separate parcels, the sale will be set aside, if the application is made within a reasonable time: *Lurton v. Rogers*, 139 Ill. 554; 32 Am. St. Rep. 214, and note. See, also, the note to *Hudepohl v. Liberty Hill etc. Co.*, 28 Am. St. Rep. 151.

EXECUTION SALE—MOTION TO VACATE—TIME.—A motion to vacate an execution sale must be made within a reasonable time, and, where there is a right of redemption, this reasonable time is probably measured by the statutory period of redemption: *Power v. Larabee*, 3 N. Dak. 502; 44 Am. St. Rep. 577. See, also, the notes to *Smith v. Perkins*, 26 Am. St. Rep. 801, and *Voorhis v. Terhune*, 7 Am. St. Rep. 786.

ALL COURTS POSSESS POWER OVER THEIR OWN PROCESS. Such power is a species of equitable jurisdiction that is inherent alike in courts of law and equity: *McLean County Bank v. Flagg*, 31 Ill. 290; 83 Am. Dec. 224, and note.

LEVYSTEIN v. O'BRIEN.

[106 ALABAMA, 352.]

JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.—Judgment against an infant duly served with summons, but without the appointment of a guardian ad litem, though irregular and erroneous, is not void, and is not open to impeachment on collateral attack.

JUDGMENTS—INJUNCTION AGAINST—INFANCY.—Equity has no jurisdiction to enjoin a judgment at law for irregularities attending and errors committed by the court in the rendition thereof, unless such irregularities or errors are of such character as to avoid the judgment ipso facto. Merely erroneous and irregular judgments, whether against infants or adults, cannot be enjoined. Void judgments against either can be enjoined.

JUDGMENTS—INJUNCTION AGAINST.—A bill in equity to restrain the enforcement of a judgment against an infant, on the ground that no guardian ad litem was appointed for such infant, is without equity and must be dismissed.

Bill in equity to restrain a judgment against an infant duly served with summons, but for whom no guardian ad litem was appointed. Demurrers to the bill were interposed, together with a motion to dismiss the bill for want of equity. These were all overruled by the court below and defendants appealed.

Farnham, Crum & Weil, for the appellants.

E. P. Morrisett, for the appellees.

³⁵⁴ McCLELLAN, J. In action against infants, service of summons must be had upon the defendant, as upon defendants who are sui juris; and such service is as efficacious in the former as in the latter case to give the court jurisdiction of the cause. Having thus acquired jurisdiction of the person of an infant defendant, it is the court's duty to appoint a guardian ad litem to make defense for him; but a ³⁵⁵ failure to discharge this duty does not oust the court's jurisdiction, which has already attached; but, to the contrary, if the case proceeds to judgment against the infant without such appointment, whether upon issue joined and trial had or upon the default of the defendant, such judgment, though irregular and erroneous, and to be so declared upon appeal, is not void, and is, therefore, not open to impeachment upon collateral attack: 1 Freeman on Judgments, sec. 151; 2 Freeman on Judgments, sec. 487; 10 Am. & Eng. Ency. of Law, 692-697; Brown on Jurisdiction, 113; Drake v. Hanshaw, 47 Iowa, 292; Joyce v. McAvoy, 31 Cal. 273; 89 Am. Dec. 172, and notes 185, et seq.; Simmons v. McKay, 5 Bush, 25. This doctrine has been recognized by this court in the analogous case of a lunatic defendant: Walker v. Clay, 21 Ala. 797, 807. And there is, we take it, nothing in the suggestion that, because of the mandatory terms of section 2579 of the code, a judgment against an infant without the appointment of a guardian ad litem is not merely erroneous and irregular, but void. This section is equally mandatory in respect of suits by infants—they "must sue by next friend," yet it would scarcely be insisted that a judgment at the suit of an infant in his own name against one sui juris would be void. The succeeding section—2580—is equally mandatory in form in respect of lunatics, but, as we have seen, judgments against lunatics are not void though this mandate has been disregarded. And a reference to the authorities cited above shows that, under equally mandatory statutes in other states, the ruling has been that a failure to appoint a guardian to defend for the infant is, at most, reversible error and not matter for impeachment of the judgment, except upon direct assault.

In chancery, infant defendants can only be brought in by service upon their parents or either of them, if in life, or upon their general guardian, in case the parents are dead, provided such parents or guardian are not adversely interested, and in this latter case, or if there be no parent or guardian, then upon the infant personally if over fourteen years of age, etc.; Code, p. 814, R. 23. Hence, what is said in *Daily v. Reid*, 74 Ala. 415, 417, as to the invalidity of a decree pro confesso against an infant has no application to a judgment at law on personal service against an infant defendant, especially in ³⁵⁶ view of the doctrine there announced that the chancery court "is the guardian of all infant litigants before it, and will permit no such irregularity and error [as the taking of a decree pro confesso against an infant] to pass unredressed." Nor was it intended by this language of the court in that case, as counsel insist, to convey the idea that the substantive rights of an infant stood upon a plane different from and higher than the rights of persons *sui juris*, or were to be adjudged by a different standard, but only that the court would so far act as his guardian as to see to it that his abstract rights were properly presented to and represented before the forum of conscience, but this is not to say that a court of equity, any more than a common-law court, when the claim of the infant is fully presented, would grant any other relief on the merits thereof than an adult litigant would be entitled to on the same facts. It is, therefore, quite an error to suppose that chancery will enjoin a judgment at law against an infant which is not void and merely irregular and erroneous on the theory that it is the guardian of all infant litigants, when it is without competency to enjoin such a judgment against a person of full age. The well-settled law is, that chancery has no jurisdiction to enjoin any judgment at law for irregularities attending, and errors committed by the court in, the rendition thereof, unless such irregularities or errors were of a character to avoid the judgment *ipso facto*; a merely erroneous and irregular judgment, whether against infants or adults, will not be enjoined; a void judgment against either will be. We have seen that the judgment sought to be enjoined here was of the former class; it was irregular and erroneous, but not void. This appears by the bill. And this is the only ground upon which relief by injunction is sought; no surprise, accident, mistake, or fraud is alleged. The bill was, therefore, without equity. The court erred in overruling the motion to dismiss for want of equity, and also in overruling those assignments of demurrer which went to the point we have been considering: 2 Freeman on Judgments,

secs. 489, 513; 10 Am. & Eng. Ency. of Law, 889, et seq.; 12 Am. & Eng. Ency. of Law, 147 a; Collier v. Falk, 66 Ala. 223, 228; Murphree v. Bishop, 79 Ala. 404; Preston v. Dunn, 25 Ala. 507.

It may also be that even had this judgment been void, ³⁵⁷ complainant's remedy against it was not by bill for injunction, though as, if void, it is not so upon its face, we have proceeded upon assumption that equity would enjoin it had it been not merely irregular but wholly invalid.

The decree of the city court must be reversed; and a decree will here be entered sustaining the demurrer, and the motion to dismiss the bill for want of equity, and dismissing the same.

Reversed and remanded.

JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.—That a judgment against an infant is not subject to collateral attack for want of jurisdiction because no guardian ad litem was appointed, see the note to Cohee v. Baer, 39 Am. St. Rep. 275, 276.

INJUNCTIONS AGAINST JUDGMENTS.—A judgment will not be enjoined unless it appears to be inequitable as between the parties, no matter how irregular were the proceedings under which it was rendered: Hartford etc. Ins. Co. v. Meyer, 30 Neb. 135; 27 Am. St. Rep. 384, and note. Relief by injunction from a judgment without notice will not be given when the party complaining has an adequate remedy at law, nor, as a general rule, when he has an opportunity to make a motion for a new trial at the term at which the judgment was rendered: Hamblin v. Knight, 81 Tex. 351; 26 Am. St. Rep. 818, and note. A judgment will not be enjoined in the absence of proof of a defense on its merits, or that it is contrary to equity or good conscience: Wilson v. Shipman, 34 Neb. 573; 33 Am. St. Rep. 660, and note.

PEOPLE'S BANK v. JEFFERSON COUNTY SAVINGS BANK.

[106 ALABAMA, 524.]

NEGOTIABLE INSTRUMENTS—RESTRICTED INDORSEMENTS—EFFECT OF.—If the owner of a draft indorses it "for collection," or "for," or "on account of," the owner, this is a restricted indorsement and gives notice that the draft is the property of the owner, and that it is no longer negotiable, and one acquiring it thereafter cannot claim protection as an innocent purchaser.

NEGOTIABLE INSTRUMENTS—RESTRICTED INDORSEMENT—EFFECT ON COLLECTING BANK.—A bank which collects money upon a draft sent to it by the bank to which it was indorsed for collection by the owner with a restricted indorsement, holds it in trust for the owner, and has no authority to apply it to the indebtedness due from the forwarding bank, and this without reference to notice of its insolvency, and irrespective of any agreement between it and the collecting bank.

NEGOTIABLE INSTRUMENTS—RESTRICTED INDORSEMENT—COLLECTION—RIGHT TO PROCEEDS.—If a bank receives for collection only a draft containing an indorsement directing payment to the forwarding bank "for account of the owner" of

the draft, the collecting bank cannot, after the insolvency of the forwarding bank with or without notice thereof, apply the amount of the draft to a debt due from the forwarding bank, for the reason that such restricted indorsement is notice of the ownership of a third person, and that the draft is no longer negotiable regardless of any agreement between the forwarding bank and the owner. Such application of the proceeds of the draft is a misappropriation, which renders the collecting bank liable to the owner for the amount of the draft.

J. Q. Cohen, for the appellant.

E. K. Campbell, for the appellee.

529 COLEMAN, J. The appellant bank sued the defendant in assumpsit for money had and received. The evidence is without conflict, and we will state the facts, substantially, which gave rise to the demand. On the seventeenth day of March, 1893, R. A. Wilkes drew a check as follows:

"\$750.00. Birmingham, Ala., March 17th, 1893.

"At sight pay to the order of Beatty & Orr seven hundred and fifty dollars, value received, and charge to the account of

R. A. WILKES."

"To Tennessee Packing Co., Birmingham, Ala."

Written across the face of the draft was:

"Accepted, payable at Jefferson County Savings Bank, Birmingham, Ala.

TENNESSEE PA'G. CO.,

By R. A. Wilkes."

It was indorsed as follows, with erasures:

"Beatty & Orr

"No. 519

"Payable to the order of F. Porterfield Cas. for collection only for account Peoples' Bank of Lewisburg, Tenn.

"R. A. McCORD, Cash."

This indorsement as erased was followed by the following indorsement:

"Pay Commercial Nat'l Bank. Nashville, Tenn., or order for account of People's Bank, Lewisburg, Tenn.

"R. A. McCORD, Cash."

"No. 17925.

"Pay to the order of Jeff. Co. Sav. Bk. for collection only for acct.

"COMMERCIAL NAT'L BANK, Nashville, Tenn.

"F. Porterfield, Cash."

The draft was paid to the Jefferson County Savings Bank on

March 25, 1893, and by that bank placed to the credit of the Commercial National Bank, and notice of the collection and credit mailed to the Commercial National Bank within banking hours on the same day. On the ⁵³⁰ day of the payment of the draft in Birmingham, the 25th of March, the Commercial Bank, doing business in Nashville, Tennessee, closed its doors and ceased to do business. The Jefferson County Savings Bank had no notice of its failing condition until after the collection of the draft, and notice of the collection and credit had been mailed. At the time of its failure the Commercial Bank was indebted to the Jefferson County Savings Bank in excess of the amount collected and credited. The draft was sent by the Commercial Bank to the Jefferson County Savings Bank in a letter, which stated that the draft was sent for collection and credit.

The question is, whether the money when collected belonged to the plaintiff bank, of which fact the collecting bank had notice, or was it the money of the Commercial Bank, and, under the written authority contained in its letter or the usage of the banks, did the collecting bank have authority to credit the amount collected in payment of the indebtedness due it from the Commercial Bank? The cashier of the plaintiff bank testified that plaintiff had an arrangement with the Commercial Bank with regard to drafts sent to it by plaintiff, to the effect that when the drafts were collected and amounts reported and placed to credit of plaintiff, the latter would draw for the amount, but not before it was reported collected, and that no report of the collection of the draft was ever made by the Commercial Bank, nor the amount placed to the plaintiff's credit; that plaintiff bank never drew against the amount of the draft; that at no time was plaintiff bank indebted to the Commercial Bank; that it had been forwarded simply for collection and so entered on their books; and that plaintiff was the owner of the draft, and never parted with its title. Unless plaintiff's rights were lost or waived by virtue of the indorsements, or its agreement with the Commercial Bank, expressly or impliedly, the plaintiff, in our opinion, was entitled to recover. We attach no importance to the canceled indorsement. The indorsement and cancellation were made by plaintiff before the transmission of the draft for collection. The unerasd indorsements determined the legal relations of the parties. The indorsement by plaintiff, "Pay Commercial National Bank or order for account of People's Bank of Lewisburg," according to all the authorities, gave notice ⁵³¹ that the paper was the property of the People's Bank, that it claimed the money due upon it, and that it was no longer negotiable paper. No one could purchase

the instrument with this indorsement, and claim protection as an innocent purchaser against the true owner. Whosoever undertook to collect this paper thus indorsed, and whether acting as the agent of the owner, or the agent of the agent, knew that the money when collected, *ex equo et bono*, would belong to the owner of the paper. Any appropriation of it otherwise, without the consent of the owner, would be unauthorized. This we understand to be the distinction between the legal effect of a restricted indorsement, such as "for collection," or "on account of," and a general indorsement in blank, or "pay to," without restrictive words. When the defendant bank received the draft for collection and collected the money, it well knew, from the restricted indorsement, if there was no other agreement, that it belonged to the plaintiff, and not the Commercial Bank, and that the Commercial Bank had no title to it, nor any power to authorize the defendant bank to apply it or its proceeds to the payment of an indebtedness due it for the Commercial Bank. As between the owner and the collecting bank, the latter collected upon the terms and conditions expressed by the indorsement, irrespective of any understanding or agreement that may have existed between it and its principal, the agent of the owner. It could not acquire a right which its principal did not possess, and it knew its principal was a mere agent of the owner for collection. No person or corporation has any authority to apply money or property received and held by its debtor as agent or upon trust, with knowledge of the fact, in satisfaction of the debts of such agent. There is no question of an innocent purchaser for value in the case.

It is contended for appellee that, under the agreement and course of dealing between the plaintiff and its agent, the Commercial Bank of Nashville, as soon as the money was collected by the latter the relation of debtor and creditor arose and the ownership of the money vested in the Commercial Bank, and the collection of the money by the defendant and crediting it upon the indebtedness of the agent bank was, in law, the transmission of the money to the agent bank, as much so as ⁵³² if actually placed in its vaults, and had the effect to create the relationship of debtor and creditor between plaintiff and the Commercial Bank. The plaintiff by its restricted indorsement gave notice to the Commercial Bank and the defendant that the draft, or the money when collected, belonged to it. No agreement between the Commercial Bank and the defendant, or any method of book-keeping, nor of keeping accounts current, could divest the owner of its title to the draft or its proceeds. There are statements in some opinions of courts of high standing seemingly in conflict with our con-

clusion, but an examination of the facts of these cases will show the principle of law applied is not applicable to the present case. In the case of the Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, where the indorsement was "for collection," Mr. Justice Brewer, delivering the opinion of the court, declared that as to the drafts which had been forwarded by the Fidelity Bank for collection to its agent, and which were not collected until after notice of its insolvency, the collecting bank, in making collections, acted as the agent of the owner of the drafts, and not as the agent of the Fidelity Bank. That as to drafts collected before the insolvency of the Fidelity Bank had been disclosed, and which had been credited by the subagents upon the drafts of the Fidelity Bank to them before notice of its insolvency, under the facts of the case, the collecting bank or subagent was not liable to the owner. The court agreed with the conclusions of the trial court, which held that "the collection had been fully completed," and that the credit to the Fidelity Bank "was the same as though the money had actually reached the vaults of the Fidelity Bank." The facts of the case, as stated in the opinion, show that there was an agreement between the plaintiff and the Fidelity Bank that the latter was to remit the 1st, 11th, and 21st of each month. Collections intermediate these dates were, by the custom of banks and the understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. By the arrangement, as to intermediate collections, the relation of debtor and creditor existed. The Fidelity Bank became the owner of the money and was a debtor to the plaintiff. We are of opinion that the court based the conclusion that the ⁵³³ subagent was not liable to the plaintiff upon the fact that the money, when collected and credited under the arrangement made with the plaintiff, was the money of the Fidelity and not the money of the plaintiff. It was the agreement between the plaintiff and its agent that remittances were to be made at stated periods only, and, in the mean time, the Fidelity Bank had the right to use the money in its business, which terminated the ownership of the plaintiff as soon as the money was collected by the Fidelity, and created the relationship of debtor and creditor. In discussing the question of collections by a subagent before and after "avowed insolvency" of the principal agent, the court was of opinion that the fact of collection by a subagent, before notice of insolvency of its principal, was "not decisive" of its liability to the owner, and the decision was rested mainly upon the agreement between the owner and its agent, by which the relation of debtor and creditor was established between the days of remittances.

In the case of *White v. National Bank*, 102 U. S. 658, the indorsement was, "Pay S. V. White or order for account of," etc. The court declared that the "indorsement is without ambiguity, and needs no explanation, either by parol or resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper, or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

In the case of *National etc. Bank v. Hubbell*, 117 N. Y. 384, 396, 15 Am. St. Rep. 515, the same distinction and rule is declared as held in *Commercial Bank v. Armstrong*, 148 U. S. 50. The court says: "The firm, by the arrangement, had the right to retain the moneys and to remit weekly, and, of course, from one week to another, it had the right to use the money, and the plaintiff relied upon the credit of the firm for such time as it had the right to retain the money."

In the case of *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643, the indorsement was, "Pay to D. or order for collection for account of C." The court held "that the restrictive indorsement destroyed the ⁵³⁴ negotiability of the bill, and operated as a mere authority to receive the proceeds for the use of the indorser." In the case of *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177, the distinction between an indorsement in blank and a restrictive indorsement is fully declared: *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553; 12 Am. St. Rep. 598; *Freeman's Nat. Bank v. National Tube Co.*, 151 Mass. 413; 21 Am. St. Rep. 461.

We are of opinion the distinction is clear and the rule sound. Without it, ownership of the draft and money would be divested against the express contract of the indorsement, and without fault. The case of *City Bank of Sherman v. Weiss*, 67 Tex. 331, 60 Am. Rep. 29, lays down the broad rule that where a bank or person collects money upon a draft sent to it by the bank to whom it was indorsed for collection by the owner, with a restricted indorsement, the agent collecting the money holds it in trust for the owner, and has no authority to apply it to the payment of any indebtedness due from the forwarding bank, and that without reference to the question of notice of its insolvency. The agreement between the plaintiff in the case at bar and the Commercial Bank did not authorize the latter to use the plaintiff's money at any time in its business. As soon as collected, it was the duty of the Commercial Bank to notify the plaintiff of the collection and

then plaintiff would draw it out. According to the facts of the case, the collection was never credited to plaintiff, and the Commercial Bank ceased to do business, and its agency terminated by insolvency before its contract with plaintiff was completed. We are of opinion under the facts of this case the plaintiff was entitled to recover, and judgment will be here rendered to that effect.

Reversed and rendered.

NEGOTIABLE INSTRUMENTS.—AN INDORSEMENT FOR COLLECTION does not pass the title nor the right to the proceeds of the property, but it makes the indorsee a collecting agent or trustee of the holder: *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99; 32 Am. St. Rep. 332, and note. See, also, the note to *Adrian v. McCaskill*, 14 Am. St. Rep. 793, 794.

BANKS.—AN INDORSEMENT FOR COLLECTION does not, as a general rule, vest title to the property in a bank, and if the paper passes into the hands of an assignee in insolvency of the bank, the owner may recover it or its proceeds: *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921. But see the case of *In re State Bank*, 56 Minn. 119; 45 Am. St. Rep. 454, and note.

HOLBROOK v. STATE.

[107 ALABAMA, 154.]

PERSONAL PROPERTY—POSSESSION OF OWNER.—The mere fact of putting one's property into the charge or possession of another does not divest the possession of the owner. The legal possession still remains in him.

LARCENY BY ONE HAVING MERE CUSTODY OF PROPERTY.—One having the mere custody of another's property may commit larceny of it. Hence, if the owner gives his property to another to take to the owner's house, and such other person wrongfully sells it, he is guilty of larceny, although he conceived the intent and purpose to so dispose of it after he received it.

LARCENY—INTENT—RULE OF CONSTRUCTIVE POSSESSION.—The general rule, that to constitute larceny the felonious intent must exist at the time of the "taking and carrying away," does not militate against the rule of constructive possession by the owner, the defendant having but the bare custody, received from the owner, and, having such bare custody, fraudulently converts the money or goods.

Sam W. Tate, for the appellant.

William C. Fitts, attorney general, for the state.

155 COLEMAN, J. The defendant was convicted of petit larceny. The evidence tended to show that the defendant was employed by one Wigginton to carry him from his home by conveyance to the depot, where he intended to board a train. Arriving at the depot, Wigginton left with the defendant a quilt, to

be returned to his home, which the defendant agreed to do. The defendant carried the quilt to a store and traded it off for an amount much less than its value.

The defendant requested the court to charge the jury that "if the jury believe from the evidence that the witness, Wigginton, delivered the quilt to the defendant, to be conveyed back to Wigginton's home, and that the quilt was received by the defendant for that purpose, and, after so receiving the quilt, the defendant conceived the intent and purpose to wrongfully dispose of it, he is not guilty as charged." One of the difficulties in distinguishing ¹⁵⁶ between larceny and embezzlement consists in the fact that in larceny there must be a trespass, and a trespass is a wrong to the possession. A bare charge of or custody of goods which belong to another does not divest the possession of the owner. It has, therefore, been held that a servant or other person having the mere custody of goods may commit larceny of them: 2 Bishop's Criminal Law, secs. 823, 824, note; 2 East's Pleas of the Crown, 565; 1 Brickell's Digest, sec. 487, p. 482; 12 Am. & Eng. Ency. of Law, 768. In *Oxford v. State*, 33 Ala. 416, 418, it is said: "It is a clear rule of law that where a party has only the bare charge and custody of the goods of another, the legal possession remains in the owner; and the party in custody may be guilty of trespass and larceny in fraudulently converting the same to his own use." In *Roscoe on Criminal Evidence*, section 646, it is said: "In order to render the offense larceny, where there is an appropriation by a servant who is already in possession, it must appear that the goods were at the time in the constructive possession of the master. They will be considered in the constructive possession of the master if they have been once in the possession of the master, and have been delivered by the master to the servant. But if the goods or money have come to the possession of the servant from a third person, and have never been in the hands of the master, they will not be considered to have been in the constructive possession of the master, for the purposes of larceny. . . . The rule has never been doubted," etc.

In case of *Washington v. State*, 106 Ala. 58, we held that the statute (Code, sec. 3795) creating and defining embezzlement did not and was not intended to convert that which was larceny at common law into statutory embezzlement. The general rule, that to constitute larceny the felonious intent must exist at the time of the "taking and carrying away," does not militate against the rule of constructive possession by the owner, the defendant having but the bare custody, received from the owner, and having such bare custody fraudulently converts the money or goods.

We are of opinion, under the facts of the case, that the court did not err, in refusing the charge requested. The other exceptions are wholly without merit.

Affirmed.

LARCENY BY BAILEE.—If possession of property is lawfully obtained, a subsequent appropriation of it is not larceny, unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands: *Smith v. Commonwealth*, 96 Ky. 85; 49 Am. St. Rep. 287, and note; *Soltau v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843, and note. A servant employed on a farm, who has the care and custody of a mule belonging to his master, is guilty of larceny when he fraudulently converts the mule to his own use and sells it: *Crocheron v. State*, 86 Ala. 64; 11 Am. St. Rep. 18. If the goods of a master fraudulently appropriated by his servant were in the actual or constructive possession of the master at the time they were taken, the offense of the servant is larceny, and not embezzlement: *Commonwealth v. Berry*, 99 Mass. 428; 96 Am. Dec. 767. If a bailee converts property to his own use with felonious intent, he is guilty of larceny: See monographic note to *State v. Homes*, 57 Am. Dec. 280, on larceny. A felonious intent at the time of taking is essential to larceny; but where one obtains possession of an article merely to look at it, but without intending to steal, and then embezzles it, he is guilty of larceny: *Dignowitty v. State*, 17 Tex. 521; 67 Am. Dec. 670.

GOODLOE v. MEMPHIS & CHARLESTON RAILROAD CO.

[107 ALABAMA, 233.]

MASTER AND SERVANT.—THE DOCTRINE OF RESPONDEAT SUPERIOR has no application when the servant actually wills and intends an injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong. Hence, the servant, and not the master, is liable for the acts of the former willfully and intentionally done.

MASTER AND SERVANT—ACT OF SERVANT FOR WHICH MASTER IS NOT LIABLE.—If a sleeping-car conductor of a railroad company is standing near the entrance to a coach, and a friend of his, a superintendent of division of the same company, comes up and makes a lick at him, in sport, with his hand, and the conductor throws up his hand as if to ward off the blow, but in doing so knocks or pushes his friend against a person who is about to enter a coach as a passenger, thereby causing the latter to fall off the platform and injure himself, the employés, if anybody, and not the railroad company, are liable for such injury, as such acts are not in the line of their respective engagements, and are not fairly incidental to their employment.

Action on the case brought by the appellant, Goodloe, against the appellee, the Memphis & Charleston Railroad Company, to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant. There was a judgment for the defendant, and the plaintiff appealed.

Jackson & Sawtelle and J. H. Nathan, for the appellant.

Humes, Sheffey & Speake, for the appellee.

238 HARALSON, J. We examine the single question presented by the defense and alone considered by the appellant: that the defendant is not guilty for the reason that the injury complained of was not inflicted on plaintiff by the defendant's servants or employés while they were acting within the range, but outside of, the authority conferred by defendant on them. Other errors assigned are not insisted on in the argument filed, and are, therefore, treated as waived.

The question presented has been well considered by this and many other courts. It was recently before us ²³⁹ in the case of *Lampkin v. Louisville etc. R. R. Co.*, 106 Ala. 287, in which, as the result of the authorities there cited, it was stated as the well-settled rule that the carrier's obligation was to protect its passengers against the violence and insults of its own servants and of strangers and copassengers; that a contract exists between a common carrier and its passengers to use all reasonable exertions to protect them from injury from fellow-passengers and its agents in charge of the train. In an earlier case, it was said that "the clearly established doctrine now is, that railroad corporations are liable for all acts of wantonness, rudeness, or force done or caused to be done by their agents or employés if done in and about the business or duties assigned to them by the corporation; and the rule of vindictive or punitive damages against such corporations for abuse by their employés of the duties and powers confided to them is the same as that which applies to natural persons who are guilty of such misconduct. It is confined, however, to abuses perpetrated in the line of duties assigned to them, and does not extend to any tort, wantonness, or wrongful act the employés may commit in matters not connected with the service of the railroad corporation. In the line of their assigned duties, they stand in the place of the corporation; without that line, the corporation is bound by nothing they may do": *Louisville etc. R. R. Co. v. Whitman*, 79 Ala. 328. The same principle had been differently but very clearly expressed in *Gilliam v. South etc. R. R. Co.*, 70 Ala. 268: "That if the employé, while acting within the scope of the authority of the employment, do an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured. But, if the agent go beyond the range of his em-

ployment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master is not."

The principle settled in these and many other similar adjudications is not disputed, but its application to the cases as they occur gives rise to continued disputations. What is meant by the words, "while acting within the range of the authority of the employment of the servant," is made the ground for contention in each case. ²⁴⁰ But that seems, also, to be well settled on authority, and while it is often a matter of nice adjustment to the facts of a case, it has been made clear enough not to be of very difficult application. It is said, on the point under consideration, that the rule of the responsibility of the master for the acts of his servant, "does not apply simply from the circumstance that at the time when the injury is inflicted the person inflicting it was in the employment of another; but that, in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it. That is, it must be an act which is fairly incident to the employment; in other words, an act which the master has set in motion. . . . And, generally, where the injury results from the execution of the employment, the master is liable": 2 Wood on Railroads, sec. 316. In explanation of the rule, this court long ago held, as the result of the authorities examined and cited, that when the servant is in the performance of his master's orders, or authorized acts, and in the doing thereof conducts himself so negligently or unskillfully that injury results to another, then the doctrine of respondeat superior applies, and the master will be liable in an action on the case, but that for the acts of the agent willfully and intentionally done, without the command and authorization of the master, the servant, and not the master, is liable, and that the rule has no application when the servant actually wills and intends the injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong: *Cox v. Keahey*, 36 Ala. 340; 76 Am. Dec. 325. So we find it held that where a slave, being a passenger on a steamboat, was wounded by a gun negligently discharged by the second engineer of the boat, the captain, in an action against him for the injury, was held not to be liable, because the discharge of the gun by the engineer was not an act done in the course of his employment, or in the discharge of any duty connected with the service: *McClenaghan v. Brock*, 5 Rich. 17. And where a servant, employed to light fires in a house, lighted furze and straw, in order to clean a chimney that smoked, and the house caught fire therefrom and was de-

stroyed, it was held that the act of cleaning the chimney in the manner stated was one outside the scope of her employment, ²⁴¹ and the master was not liable: *McKenzie v. McLeod*, 10 Bing. 385. And still again, in a recent case, where an employé, who, being behind in his accounts, was suspected of setting fire to the building in which he was employed, in order to destroy the evidence of his default, we said that there was no evidence tending to show, if the employé did set fire to the building, that it was a negligent act of his, done while in the performance of his duty, and that, if he did it at all, it was his own tortious, wicked act, done outside the line of his employment, in which the defendant did not participate, or afterward, in any manner, ratify, and for which it was not in any manner responsible: *Collins v. Alabama etc. R. R. Co.*, 104 Ala. 390.

In the case before us, the evidence shows that the appellant purchased a ticket at Tusculumbia, from the defendant company, to go as a passenger on its train to his home at Barton, and tarried in the waitingroom until the arrival of the train, when he left the waitingroom, went on the platform along the side of the train, and proceeded to the point at which he could enter the passenger coach, and when near the entrance of the coach, as he expressed it, he "was struck against, quartering on his back and shoulder with such force as to knock or push him off the platform on the south side of it, and fell to the ground, breaking his left leg," etc.

McCormick, a witness for defendant, testified that he was supervisor of the middle division of the defendant's railroad, from Corinth to Decatur, and was going over his division on the train which plaintiff was about to enter, when he was hurt; that he had nothing to do with the train as an employé; that he had gotten off on its arrival, and gone to the train dispatcher's office to see if he had any message for him, and on his return he found Mr. Porterfield, the roadmaster of defendant, and Mr. Jones, the sleeping-car conductor, in conversation with each other, on the platform. Mr. Porterfield asked witness if he had ever met Mr. Jones, to which witness made a playful remark to the effect that he did not want to know him, at the same time making a lick at him with his hand, when Jones threw up his hand, as if to ward off the blow, and knocked or pushed witness against the plaintiff, which caused him to fall off the platform, and injure himself. Jones, the Pullman ²⁴² conductor, gave substantially the same account of the transaction. There was no evidence that either had ill-will toward plaintiff, or intended to do him any harm. McCormick knew him well and was friendly with him, and Jones

did not know him at all. The evidence also shows that McCormick and Jones were friends, and what occurred between them was in sport.

What these parties did to cause plaintiff's injury was not in the line of their respective engagements, or that of either of them, to their employer; it was not fairly incidental to their employment; it was not done in pursuance of an express or implied authority from the master to do it; it was the result of the conduct of these employes who, in the commission of the injurious act, however innocently done, had stepped aside from the purposes of the agency committed to them, and inflicted an independent wrong on the plaintiff; and they, if anybody, and not the defendant company, are liable for it.

Affirmed.

Acts of Servant for which Master is not Answerable.*

True Test of Master's Liability.—The cases which have arisen concerning the acts of a servant for which his master is not answerable have from the earliest time been productive of much astute and interesting discussion in courts of law, and eminent judges have not always been harmonious in their decisions. This, however, is not surprising when we notice that each case must necessarily depend, to a great extent, upon its own peculiar facts and circumstances, and that it is sometimes a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves. The law upon the subject is simple, but there is great difficulty in its application, as an act which causes an injury may be precisely the same, whether merely careless or intentional, and the authority of the master may be wanting in one case as much as in the other. "Thus, if a servant driving his master's carriage becomes entangled in a crowd of other carriages, and is impatient to drive on, and there is not room to pass with safety, and reasonable care and prudence would require him to wait; but he persists in driving on, and in so doing strikes another carriage; this is negligence for which the master is responsible. Is the master's responsibility at an end if it is shown that the servant saw that he should strike the other carriage, and intended to extricate himself by so doing? He is in his master's employment in the one case as in the other. If his master has directed him to drive carefully, he is in each case alike acting without his master's authority or approval. His purpose in each case may be to do his master's work which he is employed to do. In the former, he does not think of, or care for, the rights of the other party, and so is negligent. In the latter, he perceives and understands the rights of the other party, but de-

* REFERENCE TO MONOGRAPHIC NOTES.

Liability of master for torts of servants: 35 Am. Dec. 192-201.

Liability of employer for acts of contractor: 51 Am. Dec. 200-206.

Liability of employer for acts or negligence of contractor: 55 Am. Dec. 317-321.

Liability of city for unauthorized acts of its officers: 110 Am. Dec. 358-360.

Course of employment: 40 Am. Rep. 226-229; 42 Am. Rep. 36-38.

termines to disregard them": *Howe v. Newmarch*, 12 Allen, 49, 53, per Hoar, J. Some confusion has also arisen by intimations that the master is not responsible for the "willful" acts of his servant; but "the rule recognized in all the recent cases," says Allen, J., in *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, 547, "and which does not materially conflict with any of the older decisions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them." On the other hand, if a servant goes outside of his employment, and, without regard to his service, acts maliciously, wantonly, or willfully, to another's damage, and to accomplish some purpose of his own, the master is not liable: *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Howe v. Newmarch*, 12 Allen, 49.

As the quality of the act does not, therefore, excuse the master in an action brought against him for the wrongful act of his servant, the simple inquiry and true test is not whether a given act was done during the existence of the servant's employment, but whether it was in the course of the servant's employment, or outside of it: *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361; *Davis v. Houghtellin*, 33 Neb. 582, 586; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *Sagers v. Nuckolls*, 3 Colo. App. 95.

"A master," says Mitchell, J., in *Morier v. St. Paul etc. Ry. Co.*, 31 Minn. 351; 47 Am. Rep. 793, where the law of our subject is well stated, "is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And, in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant steps aside from his master's business, for however short a time, to do an act

not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all the authorities."

Among the great variety of forms in which the liability or non-liability of the master for the acts of the servant has been expressed, the above is about as clear as any that has attracted our attention. If the owner of a building employs a servant to remove the roof from the house and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions, because it was done in the business of the master. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own: *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361.

If an act of an employé is lawful and one which he is justified in doing and which casts no personal responsibility upon him, the employer is not answerable therefor: *New Orleans etc. R. R. Co. v. Jopes*, 142 U. S. 18.

The master is liable to third persons for damages resulting from the negligence of his servant only when the latter is acting within the scope of his employment: *Davis v. Houghtellin*, 33 Neb. 582. He is not answerable for the negligent act of his servant or agent if the latter in performing the act from which the injury resulted was not acting in the course of his employment: *Walker v. Hannibal etc. R. R. Co.*, 121 Mo. 575; 42 Am. St. Rep. 547; *Jewell v. Grand Trunk Ry.*, 55 N. H. 84. He is not, therefore, liable to the intestate of one negligently killed by the former's servant when the act was committed outside of the employment: *Davis v. Houghtellin*, 33 Neb. 582. A railway corporation is not answerable for the negligence of one of its employés in throwing certain articles from a baggage-car while the train was in motion, and thus inflicting injury on a person standing near the track, if in so doing the employé was not acting in the course of his employment, but was performing a duty voluntarily assumed for a person other than his employer, and from the performance of which the master derived no benefit. Thus, the act of a station agent in shipping articles over the line gratuitously, and not as freight, is not within the scope of his authority, and cannot subject the corporation to liability for the negligent act of another of its employés respecting such articles also outside of the line of his employment, and not for, or on account of, the corporation: *Walker v. Hannibal etc. R. R. Co.*, 121 Mo. 575; 42 Am. St. Rep. 547. The master cannot, of course, be held liable if there was no negligence, or if the injured party contributed to the injury. For, example, in an action for damages caused by negligently tearing down the walls of an adjoining building, the defendant cannot be held liable unless the acts of those engaged in the work were negligent: *Stone v. Hunt*, 94 Mo. 475; and, in an action against the keepers of a livery stable as common carriers, to re-

cover damages for injuries to the plaintiff's goods, which, while in the hands of the plaintiff's agent, a traveling salesman, who was traveling in a wagon and team hired from the defendants and driven by the defendants' driver, were submerged in a swollen stream, the defendants may show that the agent, notwithstanding his knowledge that the stream was swimming, ordered the driver to attempt to cross, which effort resulted in the drowning of a horse, and the injuries stated: *Ewing v. Shaw*, 83 Ala. 333.

As the responsibility of the master grows out of, is measured by, and begins and ends with, his control of the servant, he is not liable for the acts of one over whom he has no control, but who is the servant of another. In other words, the master is not liable for acts not done during the relationship of master and servant. If the person whose negligence caused the injury complained of was not in the master's employment, or engaged in the prosecution of his business, when the injury occurred, or in the matter out of which the injury grew, the master is not liable; *Dwinelle v. New York etc. R. R. Co.*, 45 Hun, 139; *Marsh v. Hand*, 120 N. Y. 315; *Cornelison v. Eastern Ry. Co.*, 50 Minn. 23; *Atwood v. Chicago etc. Ry. Co.*, 72 Fed. Rep. 447; *Wiltse v. State Road Bridge Co.*, 63 Mich. 639; *Moore v. Sanborne*, 2 Mich. 519; 59 Am. Dec. 209; *Sawyer v. Martins*, 25 Ill. App. 521; monographic note to *Blake v. Ferris*, 55 Am. Dec. 317-321, on the liability of the master or principal for the negligence or misconduct of his servant or agent: *Peachy v. Rowland*, 13 Com. B. 182; *Stevens v. Armstrong*, 6 N. Y. 435.

If injury arises from the negligence of a servant, the true test by which to determine who is the master, and consequently who is liable to the party injured, is to determine who employed the servant, and who had the power to discharge him: *Michael v. Stanton*, 3 Hun, 462. If one of two partners individually owns a horse and phaeton, and sends his servant with the rig to meet and convey the other partner to their store, and the driver, whilst returning, recklessly drives against a third person and injures him, the relation of master and servant does not exist between the partner who is riding and the driver, and the plaintiff cannot recover in an action against him: *Muse v. Stern*, 82 Va. 33; 3 Am. St. Rep. 77. If a master has hired his servant to another, giving the latter the complete and absolute control and direction of the servant, with the exclusive right to discharge him, put another in his place, or put him at other work, the original master is not liable for his negligence, although he receives pay for the work so done by him, as he is, for the time being, the servant of the hirer: *Brown v. Smith*, 86 Ga. 274; 22 Am. St. Rep. 456. A railroad company is not responsible for negligence in the operation of an engine, where it and the crew by which it was operated were, at the time of the accident, rented to, and under the control of, another company: *Byrne v. Kansas City etc. R. R. Co.*, 61 Fed. Rep. 605. The owners of a foundry for years had given the ashes to their engineer in consideration of his removing them after working hours. The engineer deposited them, to the knowledge of his employers, on an uninclosed lot opposite the foundry, owned by third persons, whose permission he had obtained, and sold the ashes to third persons and to the defendants. A young child,

running across that lot, fell into a quantity of the hot ashes and was burned. The owners of the foundry were held not liable therefor: *Burke v. Shaw*, 59 Miss. 443; 42 Am. Rep. 370.

If baggage masters and mail agents are instructed, by notice, to throw off United States mail bags, from moving railroad trains, at certain designated points, but the notice uses this language: "It must be distinctly understood, however, that this does not in any way relieve baggage masters and mail agents from using all possible precaution against liability of injuring anyone in throwing off mail," etc., the failure of the baggage master, on trains carrying a mail agent, to observe how the mail agent performs his duty, does not make the railroad company liable to one injured by a mail bag carelessly thrown by the United States official: *Pennsylvania R. R. Co. v. Russ*, 57 N. J. L. 126. One who hires a hack and directs the driver where to go, but who exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, and may recover against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver; *Little v. Hackett*, 116 U. S. 366. If the hirer of a team with a driver agrees with the owner that he will temporarily furnish his own driver, the hirer is bound to ordinary care toward the owner, and the driver is his servant: *Hofer v. Hodge*, 52 Mich. 372; 50 Am. Rep. 256. In an action to recover damages for personal injuries, where the act complained of was not done by the defendant, or by anyone acting under his command or request, or by anyone whom he had the right to command, or by anyone over whose acts and conduct he had control, or by anyone whose operations he could direct, or whose negligence he could restrain; and where the act was not done for his benefit, so that an implied obligation on his part to pay compensation therefor would arise, or done in the occupation of land by him, or upon land to which he had title, a recovery against him is not authorized: *McDowell v. Homer Ramsdell Trans. Co.*, 78 Hun, 228, 232. A railroad company is not liable for the negligent acts of postal clerks or agents upon its trains in throwing mail bags therefrom: *Muster v. Chicago etc. Ry. Co.*, 61 Wis. 325; 50 Am. Rep. 141. A mere volunteer cannot recover of the master for an injury caused by the mere negligence of the master's servants, or for an injury caused by a defect in the instrumentalities used: *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141; 45 Am. St. Rep. 460. If a teamster, employed by a shipper, is hauling freight to the car of a railroad company, and, while driving upon a public street at the freight station there crossed by the company's tracks at a point practically within the company's yard, is injured through the negligent act of the flagman at the crossing, the company is not, under a statute placing the teamster, under such circumstances, in the same situation as though he had been in the employment of the company, liable for the act of the flagman: *Baltimore etc. R. R. Co. v. Colvin*, 118 Pa. St. 230. One agreeing to furnish another with a team and suitable driver, cannot recover from the hirer for the loss of the team occasioned by the driver's carelessness and incompetency: *Ames v. Jordan*, 71 Me. 540; 36 Am. Rep. 352. If the vessel of one, while

sailing for pleasure on Sunday, is injured by a collision with another vessel, produced by the negligence of those in charge of the latter, he cannot recover against the owner: *Wallace v. Merrimack River etc. Co.*, 134 Mass. 95; 45 Am. Rep. 301. If a storekeeper, having sold merchandise, permits or directs the purchaser's servant to remove it by throwing it from an upper window into the street, and the servant does this carelessly, injuring the plaintiff, the storekeeper is not liable. The doctrine of respondeat superior does not apply in such a case: *McCullough v. Shoneman*, 105 Pa. St. 169; 51 Am. Rep. 194.

Implied Authority to Perform Particular Acts.—If the act of a servant is necessary to accomplish the purpose of his employment, and is intended for that purpose, then it is implied in the employment, and the master is liable, though the servant may have executed it willfully and maliciously: *Evansville etc. R. R. Co. v. Baum*, 26 Ind. 70. But the master is not liable for injuries caused by the act of a servant having no implied authority to do the act occasioning the injury. Thus, a brakeman upon a railroad train has no implied authority to eject a trespasser from the cars, unless called upon by the conductor to act. Whether the act complained of can be implied from the general authority conferred upon the servant depends upon the nature of the services he is engaged to perform, and the circumstances of each particular case: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902. Two persons employed as a pilot and engineer on a steamer have no implied authority to leave the steamer and undertake to operate an aerial railway, and their master is not responsible for injuries caused by them in the pursuit of this entirely different purpose from that for which they were employed: *Biederman v. Brown*, 49 Ill. App. 483. If the foreman or superintendent of a squad of men who are in the employment of a waterworks company, and engaged in getting out stone from a quarry, places powder and dynamite in a blacksmith shop against the remonstrance of one who is afterward injured by an accidental explosion of the substances, the company is liable if the act of the foreman in placing the explosives in the shop was done with the bona fide purpose of preserving them, as from rain, thus furthering his employer's interests; but not if it was done by the foreman for a purpose of his own: *Birmingham Water Works Co. v. Hubbard*, 85 Ala. 179; 7 Am. St. Rep. 35. A railway roadmaster, having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach: *Louisville etc. Ry. Co. v. McVay*, 98 Ind. 391; 49 Am. Rep. 770. A railroad division superintendent has no implied authority from the company to employ surgical aid for passengers injured in an accident: *Union Pac. Ry. Co. v. Beatty*, 35 Kan. 265; 57 Am. Rep. 160. While the defendant's omnibus was being driven by their servant, a policeman, thinking that the driver was drunk, ordered him to discontinue driving, the omnibus then being only a quarter of a mile from the defendant's yard. The driver and the conductor of the omnibus thereupon authorized a person who happened to be standing by to drive the om-

nibus home. In doing so, that person, through his negligence, injured the plaintiff, and it was held that, as the defendants might have been communicated with, there was no necessity for the servants to employ another person to drive the omnibus home, and that the defendants were not liable for the negligence of the person so employed, but whether the defendants would have been liable if there had been such a necessity was not decided: *Gwilliam v. Twist* [1895], 2 Q. B. 84. So, if the crew of a vessel, without the master's knowledge or authority, fire a salute with a cannon on board, and thereby injure a third person, the master is not liable, where it is no part of their duty to use or to discharge the gun: *Haack v. Fearling*, 4 Abb. Pr., N. S., 297. And, if a female servant, having authority to light fires in a house, but not to clean the chimneys, lights a fire for the sole purpose of cleaning a chimney, her employer is not liable for an injury caused by her negligence in lighting the fire, as that act is without the scope of her employment: *McKenzie v. McLeod*, 10 Bing. 385. A servant who directs a stranger into a dark room on his master's premises, not used as a passageway for strangers, is not acting in the line of his duty, or by the direct or implied authority of his master, and the latter is not liable for the servant's act if the stranger is there injured by stepping into an unguarded opening in the floor. And this is so, although the stranger is seeking the master for the purpose of delivering to him a message from one of his employes, as he is to be treated, so far as the duty or care owed him by the master is concerned, as a mere intruder: *Lackat v. Lutz*, 94 Ky. 287. If a railway company, in the exercise of its rights, makes provision for carrying passengers and freight by different trains, the conductors and brakemen have no implied authority to receive passengers upon freight trains. It is not within the scope of their authority, and if they do so receive passengers, and injury results, the company is not bound for the wrongful act: *Texas etc. Ry. Co. v. Black*, 87 Tex. 160; *Candiff v. Louisville etc. Ry. Co.*, 42 La. Ann. 477. A servant is not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do. Hence if the superintendent and clerks of their employer's store call a policeman into the store, and direct him to arrest and examine the person of a lady suspected of having stolen goods, the master is not liable, where the act was done without his express or implied authority: *Mali v. Lord*, 39 N. Y. 381; 100 Am. Dec. 448. Compare *National Bank v. Baker*, 77 Md. 462. If a landlord tells his lessees to take a certain fence down, which runs across a right of way leading from the defendant's quarry, and that he will stand by them, these words do not warrant an implication of an instruction to commit an assault and battery: *Wagner v. Haak*, 170 Pa. St. 495.

Deviations or Departures from Employment.—A master is not liable for the act of his servant, unless it was done for the purpose and as a means of doing what the servant was employed to do. An act done by the servant while engaged in his master's work, but not done as a means or for the purpose of performing the work, is not to be deemed the act of the master. If a servant deviates or departs from his employment, and engages in affairs of his own,

the master is not liable: *Bowler v. O'Connell*, 162 Mass. 319; 44 Am. St. Rep. 359; *Courtney v. Baker*, 5 Jones & S. 249; *Barlow v. Emmert*, 10 Kan. 358; *Pittsburg etc. Ry. Co. v. Shields*, 47 Ohio St. 387; 21 Am. St. Rep. 840.

The master is not liable for the acts of a servant who uses his position for a cloak to protect himself in the execution of a purely private purpose, unconnected with the service of his employer: *Oakland City etc. Soc. v. Bingham*, 4 Ind. App. 545. If a boy leading a colt belonging to his master invites another boy to ride thereon, and the latter, accepting the invitation, is injured by the colt, the master cannot be held answerable, unless the invitation was given in the course of the work or for the purpose of accomplishing it: *Bowler v. O'Connell*, 162 Mass. 319; 44 Am. St. Rep. 359. A railway company is not liable for damage to property adjoining its road by a fire kindled by its sectionmen for the purpose of cooking their meals, while engaged in repairing the track: *Morier v. St. Paul etc. Ry. Co.*, 31 Minn. 351; 47 Am. Rep. 793. So, where the plaintiff lent his shed to the defendant to make therein a signboard, and a carpenter, employed by the defendant, caused the shed to be burned by lighting his pipe from a lighted shaving which he dropped into other shavings on the ground, thus setting fire to the building, the defendant was held not liable either as bailee or by relation of master and servant. The carpenter's lighting his pipe was not an act within the scope of his employment, "but an act done for his own gratification": *Williams v. Jones*, 3 Hurl. & C. 256. If a parlor car is in use on a railroad under an agreement between a corporation owning the car and the railroad company, the sleeping car company is not liable for an injury caused to a person, not a passenger, by the porter of the car, who is in its employ, throwing from the car a bundle, containing his soiled clothing and other effects, solely for his own convenience: *Walton v. New York etc. Sleeping Car Co.*, 139 Mass. 556. The owners of a vessel are not liable for an injury to a laborer, employed in loading ice on the vessel from a wharf, where he, after finishing his work, goes on board the vessel for the gratification of his curiosity, and there falls down an open hatchway and breaks his leg, as he is a mere intruder: *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514. One who has been injured by the servant of another person cannot hold the master liable for the injury if it was the result of arrangements made by the plaintiff with the servant, and known to him to be contrary to previous directions from the master to the servant: *Snider v. Crawford*, 47 Mo. App. 8. If a servant, during a deviation from the strict line of his employment is "on a frolic of his own," without being at all on his master's business, the latter is not liable: *Ritchie v. Waller*, 63 Conn. 155; 38 Am. St. Rep. 361; *Limpus v. London etc. Omnibus Co.*, 1 Hurl. & C. 526. If a railroad station agent is authorized to explode torpedoes for the purpose of signaling a train, in the vicinity of a station where persons are standing on the platform, and does so, the railroad company is liable for injuries resulting therefrom if the act is negligent and dangerous; but it is not liable if the station agent, in so doing, goes outside of his employment in order to effect

a purpose of his own, and explodes the torpedoes for his own amusement, and not for the purpose of signaling a train: *Smith v. New York etc. R. R. Co.*, 78 Hun, 524. A railroad company is not answerable for an injury to one struck by a drill thrown from a car by the baggageman, and which has been regularly carried by him gratuitously for the plaintiff without the knowledge of the company: *Walker v. Hannibal etc. R. R. Co.*, 121 Mo. 575; 42 Am. St. Rep. 547. A railroad company is not liable for the acts of its ticket agent, in assisting the police to entrap and arrest persons supposed to be guilty of passing counterfeit bills. The agent departs from the line of his duty when he takes a bill supposing it to be counterfeit, and is not engaged in the discharge of any duty as agent when he points out the men suspected. If the bills turn out to be good, the company is not, therefore, liable, in an action for unlawful arrest and imprisonment, for the acts of the agent: *Mulligan v. New York etc. Ry. Co.*, 129 N. Y. 506; 26 Am. St. Rep. 539. The owner of a steamboat, carrying a slave as a passenger, was held not to be liable for an injury done to the slave by the accidental discharge of a gun in the hands of a free negro, who was employed as a servant on the boat, the free negro and the slave being, at the time of the accident, on board a lighter alongside of the steamboat. The principle controlling the case is, that the master is not responsible for the act of his free-servant done outside the scope of his employment: *McClenaghan v. Brock*, 5 Rich. 17. The officers of a mining company are not answerable for injuries occasioned from a gunshot wound inflicted upon a noncombatant in the course of a conflict between former employés of the company and their successors, which is precipitated either by the acts of the former employés, or by guards employed by the company, and the succeeding employés obtain possession of arms, without the company's consent, but which were originally furnished them for their protection and subsequently taken away: *Thorburn v. Smith*, 10 Wash. 479.

Unauthorized invitations to ride or to drive may be such a deviation or departure from the scope of the servant's employment as to exempt his master from liability for resulting injuries. For a servant driving a dumpcart to invite a boy to drive it for the latter's pleasure is not within the scope of the former's authority, and the master is, therefore, not answerable for injuries received by the boy while so driving: *Driscoll v. Scanlon*, 165 Mass. 348; 52 Am. St. Rep. 523. The employés of a company operating a freightboat, who are expressly forbidden to carry passengers upon it, have no authority to bind the company by contract to carry passengers: *Cook v. Houston etc. Nav. Co.*, 76 Tex. 353; 18 Am. St. Rep. 52. A railroad company is not liable if its servant, in causing injury to another, is not acting within the scope of his employment: *Chicago etc. Ry. Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380. An engineer acts without the scope of his authority in inviting a person to ride on the engine, and if injury is suffered by such person without further fault on the part of the engineer or other servants of the company, it is not liable: *Chicago etc. Ry. Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380; *Chicago etc. R. R. Co. v. Casey*, 9 Ill. App. 632. A servant employed to manage a dumpcar hauling stone and other material out of

a tunnel, has no authority to assent to a third person riding in such car, and the master is not answerable if such person, so riding, is injured or killed: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751. In the absence of proof that a railway company is accustomed to carry passengers upon handcars, one who is injured while thus riding has no cause of action against the company, although invited thus to ride by the section foreman: *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65; 35 Am. Rep. 299. The act of a motorman, running an electric railway car, inviting a boy to ride, is not within the scope of his duty as an employé, and is not in furtherance of the company's interest or for its benefit. The law will not imply an assent upon the part of the company to such an invitation by its servant, and the company is, therefore, not liable if the boy is injured: *Finley v. Hudson Electric Ry. Co.*, 64 Hun, 373. If a person, though a child of tender years, is invited or advised by a railroad employé to get upon and ride on a gravel, freight, or other car of the railroad company, and is injured while getting on or off the car, or while riding thereon, the company is not answerable for the consequences of this departure or deviation of the servant from the course of his employment, as his act of invitation or advice is not within the line of his duty: *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *Snyder v. Hannibal etc. R. R. Co.*, 60 Mo. 413; *Keating v. Michigan Cent. R. R. Co.*, 97 Mich. 154; 37 Am. St. Rep. 328; *Smith v. Louisville etc. R. R. Co.*, 124 Ind. 394. A rule of a railroad corporation, forbidding the carrying of passengers upon freight or construction cars without a pass applies, not only to passengers paying fare, but to a former employé riding on a freight train by invitation of the conductor: *Powers v. Boston etc. R. R.*, 153 Mass. 188. The ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such trains, or to accept them as passengers: *Powers v. Boston etc. R. R.*, 153 Mass. 188, 190.

The conductor of a railroad train cannot, in violation of a known rule of the company, license a man to occupy a place of danger so as to make the company responsible: *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21; 37 Am. Rep. 651. A railroad company is not answerable for stock killed by one of its locomotives, in use, at the time, by a servant of the company, but without authority, for his own purpose, and outside the line of his employment: *Cousins v. Hannibal etc. R. R. Co.*, 66 Mo. 572. If the pilot of a ferryboat attempts to put a man, as a personal favor, upon a towboat, but, through the negligence of those in charge of the ferryboat, she collides with a canalboat, attached to the tow, whereby the man is killed, there can be no recovery for such death against the owner of the ferryboat, by reason of its employés having, without authority, departed from the business of their master, and the latter is not answerable for their negligent acts: *Quinn v. Power*, 17 Hun, 102.

The master is not answerable for the act or neglect of his servant, when doing something which the master has not ordered done, if he has not authorized the servant to exercise a discretion in determining what to do: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751. Consequently, if a master's servant, who is driving a wagon, coach, van,

or other vehicle belonging to his master, though being in the employment of his master at the time, departs or deviates from the line of his duty, and goes upon some business, pleasure, or errand of his own, the master is not answerable, if injury results to a third person, while the servant is thus acting without the scope of his employment: *Rayner v. Mitchell*, L. R. 2 C. P. D. 357; *Storey v. Ashton*, L. R. 4 Q. B. D. 476; *Weldon v. Harlem R. R. Co.*, 5 Bosw. 576; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 547; *Howe v. Newmarch*, 12 Allen, 49.

The master is, therefore, not answerable where the servant, whose business it is to go upon an errand for his master, goes upon an errand of his own, after doing that for the master, and negligently runs into and injures another's horse: *Sheridan v. Charlick*, 4 Daly, 338; or, where the servant, whose business it is to deliver merchandise on a truck, goes, after doing his work, to a distant place for a trunk, as a personal favor to another driver, and negligently runs over and kills a person while going for the trunk: *Cavanagh v. Dinsmore*, 12 Hun, 465; or, where the servant, whose business it is to take out beer to customers, takes out his master's horse and cart, without the latter's permission, and for a purpose wholly unconnected with his master's business, and, while on his way home, negligently runs against the plaintiff's cab, damaging it: *Rayner v. Mitchell*, L. R. 2 C. P. D. 357; or, where the servant, whose duty it is to deliver some wine and to bring back some empty bottles, instead of depositing the bottles on his return and putting up his horse and cart at stables in the neighborhood, is induced, after office hours, by a clerk, to drive in a different direction on business of the clerk's, and while thus driving negligently runs over and injures a child: *Storey v. Ashton*, L. R. 4 Q. B. D. 476; or, where the master's teamster engages a stranger, without the master's knowledge, authority, or consent, to drive the team temporarily, and the stranger negligently runs over and kills a child: *Mangan v. Foley*, 33 Mo. App. 250; or, where a son, twenty-eight years old, living with his father as a hired man on his farm, took his father's horse without the owner's permission, and drove to a railroad depot to get one of his own friends; and, where the horse, after being tied at the depot, broke away and run into the plaintiff's team and injured him: *Way v. Powers*, 57 Vt. 135; or, where a third person, though he may be at the time employed by a railroad company, unexpectedly and wantonly assaults a team which one of the company's servants is taking through a public street, after having been detached from a car, and causes the team to become frightened and unmanageable, and while in this condition to run over the plaintiff: *Weldon v. Harlem R. R. Co.*, 5 Bosw. 576; or, where a minor son, who had been permitted to use his father's horse and wagon without restriction, took them in the absence and without the knowledge of his father, on business of his own, left the horse unfastened in the street, and the horse ran away and injured the plaintiff's carriage: *Maddox v. Brown*, 71 Me. 432; 36 Am. Rep. 336; or where a teamster, ordered to deliver a wagonload of paper at a certain place and to a certain party, and to return a given way with a load of wood, goes further, upon the request of such party, to a railway station, to get some

freight for such party, and while there the unfastened team runs away and injures the plaintiff's property: *Stone v. Hills*, 45 Conn. 44; 29 Am. Rep. 635; or, where the defendant's servant wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, thereby producing an accident: *Croft v. Alison*, 4 Barn. & Ald. 590. A servant departs from his employment whenever he goes beyond the scope thereof and engages in affairs of his own: *Pittsburg etc. Ry. Co. v. Shields*, 47 Ohio St. 387; 21 Am. St. Rep. 840.

Acts without Scope of Employment.—A master is not answerable for the acts of his servant committed outside the line of his duty and not connected with the master's business. The test of the master's responsibility for the act of his servant is, not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business which the servant was employed by the master to do. It is the character of the employment, and not the private instructions given by the master to his servant that must determine his liability. Hence, if a servant acts without reference to the service in which he is employed, to effect some independent purpose of his own, his master is not answerable: *Western Union Tel. Co. v. Mullins*, 44 Neb. 732; *Walker v. Hannibal etc. R. R. Co.*, 121 Mo. 575; 42 Am. St. Rep. 547; *Stephenson v. Southern Pac. Co.*, 93 Cal. 558; 27 Am. St. Rep. 223; *McClung v. Dearborne*, 134 Pa. St. 396; 19 Am. St. Rep. 708; *Louisville etc. Ry. Co. v. Palmer*, 13 Ind. App. 161; *Garretzen v. Duenckel*, 50 Mo. 104; 11 Am. Rep. 405; *Baker v. Kinsey*, 38 Cal. 631; 99 Am. Dec. 438; *Chicago etc. Ry. Co. v. Mogk*, 44 Ill. App. 17; *McCoy v. McKowen*, 26 Miss. 487; 59 Am. Dec. 264; *Courtney v. Baker*, 5 Jones & S. 249; *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418; *Andrews v. Green*, 62 N. H. 436.

In determining whether a particular act is done in the course of a servant's employment, it is proper first to inquire whether the servant was at that time engaged in serving his master. If not, the master is not responsible, even though the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master: *Garretzen v. Duenckel*, 50 Mo. 104; 11 Am. Rep. 405.

An engineer in charge of a locomotive, who, with intent to frighten passengers on a street-car, backs the locomotive toward and so near such car that they become frightened, and jump off and are injured, is not acting in the prosecution of his master's business, and the latter, therefore, is not liable for the damages resulting to such passengers: *Stephenson v. Southern Pac. Co.*, 93 Cal. 558; 27 Am. St. Rep. 223. If the functions of the foreman of a railroad company are simply to employ and discharge laborers when necessary, the company is not liable for his act in injuring a grocer by language and conduct which has the effect of diverting other employes from dealing with the grocer, as such act is not within the scope of the foreman's employment: *Graham v. St. Charles etc. R. R. Co.*, 47 La. Ann. 1656; 49 Am. St. Rep. 436. A telegraph company is not liable for the acts of its agent in making a verbal misstatement to one receiving a dispatch as to the location of a certain place, causing much expense for traveling and loss of time: *Western Union Tel. Co. v.*

Mullins, 44 Neb. 732. So it is not within the line of employment of a telegraph company's receiving clerk to correct, at the request of a sender of a message, a mistake made by the sender in writing the message, and the company is not, therefore, liable for the consequences of sending the message as corrected by the clerk, though he himself made a mistake in making the correction: *Western Union Tel. Co. v. Foster*, 64 Tex. 220; 53 Am. Rep. 754. If one of a number of railroad employes, returning home from work, on a repair train, upon which is a quantity of refuse timber gathered by them during the day to be thrown off as they pass near their homes, in accordance with a practice which has existed for several years, throws a piece of the timber from the train, accidentally injuring a person standing on an adjacent sidewalk, the company is not answerable: *Fletcher v. Baltimore etc. R. R. Co.*, 6 D. C. App. 385. The owner of a bridge is not answerable for the bite of a vicious dog belonging to the tollkeeper, where he does not keep or harbor the dog in person, does not authorize or require it to be kept, and where the keeping of the dog is not necessary in the conduct or protection of the business: *Baker v. Kinsey*, 38 Cal. 631; 99 Am. Dec. 438. The mere fact that a policeman is commissioned at the request of a railroad company for guarding its property and paid by it, does not render the company answerable for all his acts: *Hardy v. Chicago etc. R. R. Co.*, 58 Ill. App. 278. If a servant is directed to drive cattle out of a certain field, and he drives them out of the field, and one of them dies, the master is not answerable: *Oxford v. Peter*, 28 Ill. 434. The defendant put his mare in the defendant's livery stable for keeping, instructing a servant of the latter to exercise her, but this was not part of the contract of keeping. The mare died in consequence of immoderate riding by the servant, and the defendant was held not answerable: *Adams v. Cost*, 62 Md. 264; 50 Am. Rep. 211. A common carrier of passengers is not liable for the negligent destruction of money kept in the custody of the passenger and carried by him, without notice to the carrier, for a purpose unconnected with the expenses of the journey; and, where the plaintiff intrusted a package of money to his agent to carry, and the agent, while a passenger on a railroad, was killed, and the money which was carried on the agent's person, without notice to the railroad company, was destroyed by the company's negligence, it was held that the company was not liable for the loss of the money: *First Nat. Bank v. Marietta etc. R. R. Co.*, 20 Ohio St. 259; 5 Am. Rep. 655. A passenger on a freight train of defendant was killed by an accident while so riding. The defendant's conductors were forbidden to allow passengers on freight trains, and the deceased knew that regulation. He was on the train with the conductor's consent, but it did not appear that he paid fare. Held, that it could not be presumed that the defendant had contracted to carry the deceased as a passenger, and no action would lie for his death: *Houston etc. Ry. Co. v. Moore*, 49 Tex. 31; 30 Am. Rep. 98.

The owner of a borrowed horse and carriage is not liable for an injury to a third person, caused by the borrower's negligent driving, if the rig was not in use, at the time, in the business of the owner: *Herlihy v. Smith*, 116 Mass. 265. If work on a building undertaken

by several men under the direction of a foreman is necessarily suspended while rolls of paper are being unloaded from a van and rolled into the basement, the foreman has no authority to bind his employer by ordering his men to assist in the unloading; and, if he does so order any of his men, the employer is not answerable for their acts while so assisting in the unloading: *Brown v. Jarvis Engineering Co.*, 166 Mass. 75. If the plaintiff occupies premises beneath the defendant, who has a lavatory, in a room of the offices occupied, for his own exclusive use, and has given orders to his clerk that no one shall come into his room after he leaves, and a clerk goes into the room to wash his hands at the lavatory after his employer has left, turns the water tap, and negligently leaves it so that the water flows from it into the plaintiff's premises and damages them, the defendant is not answerable, as the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment: *Stevens v. Woodward*, 6 Q. B. D. 318. If a servant is directed to set a fire upon the owner's premises, and is told to take charge of it, but he drops coals while setting fires that he has not been ordered to do, whereby fire is communicated to the plaintiff's property, the owner is not answerable. He is not responsible for the negligence of his servant in doing that which he has not been ordered to do: *Wilson v. Feverly*, 2 N. H. 548; *Andrews v. Green*, 62 N. H. 436. If the driver of a hack, employed to drive in the day, uses the hack for his own purposes, in the night-time, unauthorized by the owner and without his knowledge, the latter is not liable for the driver's failure to observe an ordinance requiring him to have two lighted lamps to his carriage when driving it in the night-time: *Campbell v. Providence*, 9 R. I. 262. If a storekeeper, who is also the station agent of a railroad company, places an open barrel of salt under a warehouse situated near the railroad track, and on the company's right of way, the warehouse being owned by a third person, to which salt cattle are attracted, the act of the agent is not the act of the company, rendering it liable for cattle killed by a passing train: *Burger v. St. Louis etc. Ry. Co.*, 123 Mo. 679. The plaintiff, being the tenant of a house which the defendants had been moving under a contract with the owner, was injured by reason of the insufficiency of steps which had been temporarily erected, at the door of the house, by the defendants' workmen, at the request of the plaintiff, after they had quit work for the day. Neither of the defendants, nor their foreman, was present, and it was held that, as the defendants were under no obligation to erect the steps, the acts of the workmen were not within the scope of their employment, and that the defendants were not answerable for their negligence: *Dells v. Stollenwerk*, 78 Wis. 339. An engineer and fireman on a Texas railroad permitted a man named Cooper to ride in the cab of a freight train. They had no authority to do so, and Cooper was not a passenger. Wishing to play a practical joke upon Cooper, the fireman inserted the end of a hose in Cooper's pocket, without his knowledge, and the engineer, for amusement, turned hot water or steam into the hose, thinking it was cold water, and scalded Cooper, inflicting a serious bodily injury. The acts of the engineer and fireman, not being in the real or apparent scope of their duty, or in furtherance

of the business of the railroad company, and not being necessary in the accomplishment of the objects for which they were employed, the company was held not liable for the injury: *International etc. R. R. Co. v. Cooper*, 88 Tex. 607. Further illustrations from English courts will be found in the monographic note to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192-201, on liability of master for torts of servant.

Whether a particular act of a servant was or was not done in the line of his duty is, in most cases, a question of fact, to be determined by the jury from the surrounding facts and circumstances: *St. Louis etc. Ry. v. Hendricks*, 48 Ark. 177; 3 Am. St. Rep. 220; *Ritchie v. Waller*, 63 Conn. 155; 38 Am. St. Rep. 361; *Mouso v. Kellogg Newspaper Co.*, 58 Minn. 406; *Young v. South Boston Ice Co.*, 150 Mass. 527; *Rahn v. Singer Mfg. Co.*, 26 Fed. Rep. 912; *Quinn v. Power*, 17 Hun, 102; *Aycrigg v. New York etc. R. R. Co.*, 30 N. J. L. 460; *Wise v. Covington St. Ry. Co.*, 91 Ky. 537, 541; *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170; *Lang v. New York etc. R. R. Co.*, 80 Hun, 275; *Texas etc. Ry. Co. v. Hayden*, 6 Tex. Civ. App. 745; *McKenzie v. McLeod*, 10 Bing. 385; *Limpus v. London etc. Omnibus Co.*, 1 Hurl & C. 526.

Willful, Malicious, or Criminal Acts—Torts—Frauds.—The liability of a master for the willful, malicious, or criminal acts of his servant, or for the latter's torts or fraud, is discussed, to some extent, in the notes to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192-201, and *Noblesville etc. Road Co. v. Gause*, 40 Am. Rep. 226-229. The tendency of modern jurisprudence is to hold the master answerable, not only for the negligence, but also for the torts of his servants, when done within the scope of their employment: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512. This rule, however, has no application to any act of the servant, whatever its nature may be, which is done without the line of his duty or the scope of his employment; for the law is, that if a servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant is, for the time being, suspended, and therefore the master is not answerable for the wrong. If the servant does a willful, malicious, wrongful, or criminal act, without the master's authority, and not for the purpose of furthering the interests of the master, the latter is not answerable in damages therefor: *Stephenson v. Southern Pac. Co.*, 93 Cal. 558; 27 Am. St. Rep. 223; *Howe v. Newmarch*, 12 Allen, 49; *Stringer v. Missouri Pac. Ry. Co.*, 96 Mo. 299; *Mars v. President etc. Hudson Canal Co.*, 54 Hun, 625; *Roeber v. Society etc.*, 47 N. J. L. 237; *Walker v. Hannibal etc. R. R. Co.*, 121 Mo. 575; 42 Am. St. Rep. 547; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507, and collected cases in note thereto; *Tuller v. Voght*, 13 Ill. 278; *Meehan v. Morewood*, 52 Hun, 566; *Sagers v. Nuckolls*, 3 Colo. App. 95; *Cox v. Keahey*, 36 Ala. 340; 76 Am. Dec. 325; *Ware v. Barataria etc. Canal Co.*, 15 La. Ann. 169; 35 Am. Dec. 189, and monographic note thereto, discussing the subject; *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 40; 63 Am. Dec. 154; *Gilliam v. South etc. R. R. Co.*, 70 Ala. 268, and cases there collected; *Collins v. Alabama etc. R. R. Co.*, 104 Ala. 390; *Louisville etc. Ry. Co. v. Douglass*, 69 Miss. 723; 30

Am. St. Rep. 582; McCoy v. McKowen, 26 Miss. 487; 59 Am. Dec. 264; Delhl v. Ottenville, 14 Lea, 191; Hart v. Maney, 12 Wash. 266; Cobb v. Columbla etc. R. R. Co., 37 S. C. 194. No action will lie against the master for a willful and malicious trespass of a servant, not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for his master: Evansville etc. R. R. Co. v. Baum, 26 Ind. 70, 72. In the older cases, the master or employer was relieved from liability for the tortious acts of the servant, if intentionally done, although within the range of his duties, unless the tortious act was commanded or adopted by the master: See cases cited in Gilliam v. South etc. R. R. Co., 70 Ala. 268, 271; notes to Noblesville etc. Road Co. v. Gause, 40 Am. Rep. 229; Chicago etc. R. R. Co. v. Flexman, 42 Am. Rep. 37; but this rule was never fully satisfactory, and, since the introduction of railroads, it has been modified so that if the agent, while acting within the range of the authority of his employment, does an act injurious to another, either through negligence, wantonness, or intention, then, for such abuse of the authority conferred upon him, or implied in his employment, the master or employer is answerable; but if the agent goes beyond the range of his employment, or duties, and of his own will does an unlawful act injurious to another, the agent is liable, but the master or employer is not: Gilliam v. South etc. R. R. Co., 70 Ala. 268.

An employer or master is not, therefore, answerable for a loss sustained by a third person in purchasing property, in good faith, which has been left under the control of a servant, and which the latter has fraudulently disposed of to an innocent purchaser: Knox v. Eden etc. Co., 148 N. Y. 441; 51 Am. St. Rep. 700; or for damages for injuries resulting to passengers, caused to jump off from a street-car, by the act of an engineer in charge of a locomotive, who, with intent to frighten passengers on the street-car, backs the locomotive toward and so near such car that they become frightened, as this is not acting in the prosecution of the master's business: Stephenson v. Southern Pac. Co., 93 Cal. 558; 27 Am. St. Rep. 223. If an illegal act is willfully done by a servant, outside the line of his employment, or duty, the malice will not be imputed to his master: Dillingham v. Russell, 73 Tex. 47; 15 Am. St. Rep. 753. A railroad company is not answerable, under the rule of respondeat superior, for a libel of an employé published by its general superintendent without authority from the corporation: Henry v. Pittsburgh etc. R. R. Co., 139 Pa. St. 289. If the second mate of a boat engaged in inland navigation uses violence for the purpose of compelling a deckhand to work, and the deckhand does work under such compulsion, the master is not liable for the wrong done, in the absence of evidence of the delegation of such authority to the mate: Jones v. St. Louis etc. Packet Co., 43 Mo. App. 398. The conductor of a train ordered a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars. The boy refused, but on being threatened by the conductor, uncoupled the cars, and in doing so was injured. It was held that the railroad company was not liable: New Orleans etc. R. R. Co. v. Harrison, 48 Miss. 112; 12 Am. Rep. 356. A corporation is not liable for a tortious act committed willful-

ly and maliciously by its servant, without authority from the directors or other governing body, even though it was done under orders from the president and general manager; as where one steamboat runs into and sinks a rival steamboat. A principal is not liable for a willful trespass committed by a servant, because approved of by a general agent: *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; 51 Am. Dec. 815, and note. A master is not answerable for the wrongful act of his agent in directing arrests to be made and in setting the criminal law in operation against those suspected of crime, where it is not necessary for the protection of the master's property, unless the agent has been authorized by the master to do so: *Allen v. London etc. Ry. Co.*, L. R. 6 Q. B. 65; *Carter v. Howe Machine Co.*, 51 Md. 290; 34 Am. Rep. 311; *Mall v. Lord*, 39 N. Y. 381; 100 Am. Dec. 448; *Gillett v. Missouri Valley R. R. Co.*, 55 Mo. 315; 17 Am. Rep. 653; *Mallach v. Ridley*, 24 Abb. N. C. 172. A railroad company is not liable for stock killed, or injured on its track, in consequence of the willful act of the engineer in running the train: *Cooke v. Illinois Cent. R. R. Co.*, 30 Iowa, 202.

A master is not answerable for an act of willful fraud done by his servant out of the scope of his authority, or inconsistent with the course of his employment: *Sagers v. Nuckolls*, 3 Colo. App. 95; *Coleman v. Riches*, 16 Com. B. 104; and for his own private ends: *British etc. Banking Co. v. Charnwood etc. Ry. Co.*, L. R. 18 Q. B. D. 714; or, for an assault committed by his servant, while not acting within the scope of his employment, and without the master's knowledge, authority or consent: *McGilvray v. West End Street Ry. Co.*, 164 Mass. 122; *Canfield v. Chicago etc. Ry. Co.*, 59 Mo. App. 354; *Co-field v. McCabe*, 58 Minn. 218; *Allegheny Valley R. R. Co. v. McLain*, 91 Pa. St. 442; *Curtis v. Dinneen*, 4 Dak. 245; *Meehan v. Morewood*, 52 Hun, 566; *Ware v. Barataria etc. Canal Co.*, 15 La. 169; 35 Am. Dec. 189, and note; or for other willful or criminal acts not within the scope of the servant's employment, and not authorized or sanctioned by the master: *De Camp v. Mississippi R. R. Co.*, 12 Iowa, 348; *Philadelphia etc. R. R. Co. v. Wilt*, 4 Whart. 143; *Yerger v. Warren*, 31 Pa. St. 319; *Jackson v. St. Louis etc. Ry. Co.*, 87 Mo. 422; 56 Am. Rep. 460; such as an unlawful killing, or murder; *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257; *Fraser v. Freeman*, 43 N. Y. 566; 3 Am. Rep. 740; *Candiff v. Louisville etc. Ry. Co.*, 42 La. Ann. 477; *Southern Pac. Ry. Co. v. Kennedy*, 9 Tex. Civ. App. 232; *Sagers v. Nuckolls*, 3 Colo. App. 95, 104; *Morgan v. Thompson*, 82 Ky. 383; *Davis v. Houghtellin*, 33 Neb. 582. Thus, an armed watchman, employed by the owners of a brewery to guard their property and preserve the peace, pursued a person acting on the premises in a drunken and disorderly manner, and, while he was retreating, killed him, and it was held that his employers were not liable: *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257. The relation of master and servant cannot exist in a conspiracy or confederation of individuals to commit crime: *Sagers v. Nuckolls*, 3 Colo. App. 95. A master is not answerable for wrongs caused by the carelessness of a servant in work not directed by the master, as in so placing articles that they will scare horses going over a bridge: *Wiltse v. State Road Bridge Co.*, 63 Mich. 639; or for

the act of a brakeman, engaged in a scheme of his own, in trying to take money from the pocket of one who has been allowed, by the crew, to take passage on a freight train, under an agreement with the trainmen by which he is to work his way, and which ends in a struggle, causing the plaintiff to fall or to be pushed from the running train and injured: *Alabama etc. Ry. Co. v. McAfee*, 71 Miss. 70; or for the act of a servant employed to watch a building of trifling value, on a wharf, in unnecessarily cutting adrift from the wharf, without orders or directions, a valuable steamboat, on discovering that she is on fire, and the vessel floats out of reach and is burned: *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 40; 63 Am. Dec. 154; or for the act of a conductor of a passenger train in stopping his train, pursuing a boy on foot into the father's house, with a pistol in his hand, seizing the boy, and carrying him off on the train, as such acts are not within the range of his employment: *Gilliam v.*

South etc. R. R. Co., 70 Ala. 268; or for the unlawful acts of striking employes: *Geismer v. Lake Shore etc. Ry. Co.*, 102 N. Y. 563; 55 Am. Rep. 837. A railroad company is not liable for the loss of goods which were destroyed by its warehouse being set on fire by one of its employes, for the purpose of destroying evidence of his embezzlement: *Collins v. Alabama R. R. Co.*, 104 Ala. 390. Nor is it answerable for the wrongful act of a baggage master on a railway train, in leaving his own compartment and going into that of the express messenger's, at the solicitation of the latter, and while there, so terrifying a boy who is riding in that part of the car that he jumps from the car, while it is running at a high rate of speed, and is killed, unless it is done while he is about the company's business and in the performance of some duty with respect to the boy; *Louisville etc. Ry. Co. v. Douglass*, 69 Miss. 723; 30 Am. St. Rep. 582. And a railroad company is not answerable for the act of its engineer in permitting persons to ride upon the train, as the granting of any such permission by him is an act beyond the scope of his employment and in contravention of his duty: *Chicago etc. R. R. Co. v. Casey*, 9 Ill. App. 632. If a man loans or hires a horse to another, to be used exclusively for the purposes of the latter, the owner of the horse is not answerable for the negligent manner in which the horse may be used: *Bard v. Yohn*, 26 Pa. St. 482. A master is not answerable for his servant's wrongful or careless destruction of property, as in wantonly and designedly destroying bottles of the plaintiff while washing them, by throwing them on the floor. Such conduct is without the scope of the servant's employment: *Deihl v. Ottenville*, 14 Lea, 191.

A master painter is not answerable for injuries caused by his workmen willfully spattering the walls of a room: *Garvey v. Dung*, 30 How. Pr. 315; or for the act of his servant, who is authorized merely to distrain cattle, in driving them from the highway into his master's close and there distraining them: *Lyons v. Martin*, 8 Ad. & E. 512. While a corporation is not liable for the malicious acts of its employe, unless by its subsequent conduct they are ratified by it with knowledge of the fact: *Gulf etc. Ry. Co. v. Moore*, 69 Tex. 157; a court will hesitate to hold that the performance of a wrongful act by a servant, for which his employer for any reason was not

liable at the time the act was committed, shall become the act of the employer simply because he refuses to discharge the servant from his employment: *Gulf etc. Ry. Co. v. Kirkbride*, 79 Tex. 457.

Whether a servant did a tortious act with a view to his master's service, or to serve a purpose of his own, is a question of fact for the jury: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611; *Redding v. South Carolina R. R. Co.*, 3 S. C. 1; 16 Am. Rep. 681; *Wood v. Detroit etc. Ry. Co.*, 52 Mich. 402; 50 Am. Rep. 259.

Injuries to Passengers and Trespassers.—Carriers are under obligations to carry their passengers safely and properly, and to treat them respectfully. If this duty is intrusted to a servant, he is answerable for the manner in which he executes the trust. They must protect their passengers, not only from the violence and insults of strangers, but, a fortiori, against the violence and insults of their own servants: *Lafitte v. New Orleans etc. R. R. Co.*, 43 La. Ann. 34; *Farber v. Missouri Pac. Ry. Co.*, 116 Mo. 81; *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98; *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611. A carrier is, therefore, answerable for an unlawful assault or excess of force on a passenger, or even a trespasser, by its employé acting in the line of his duty: See collected cases in the note to *Weeks v. New York etc. R. R. Co.*, 28 Am. Rep. 112; *Brown v. Hannibal etc. R. R. Co.*, 66 Mo. 588; *Molloy v. New York etc. R. R. Co.*, 10 Daly, 453; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; but not where it is outside the scope of his duty: *Chicago etc. Ry. Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380; *Crocker v. New London etc. R. R. Co.*, 24 Conn. 249, 266; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Georgia R. R. etc. Co. v. Wood*, 94 Ga. 124; 47 Am. St. Rep. 146; *Lafitte v. New Orleans etc. R. R. Co.*, 43 La. Ann. 34; *Texas etc. Ry. Co. v. Black*, 87 Tex. 160; *Molloy v. New York etc. R. R. Co.*, 10 Daly, 453.

Thus, the plaintiff, a passenger on defendants' road, applied to the baggage master to have his trunk checked, which not being promptly done, the plaintiff became angry and used threatening and abusive language, whereupon the baggage master seized a hatchet and struck him. The company was held not answerable for the act: *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; 2 Am. Rep. 373. So, the plaintiff, being a passenger in a street-car, and, wishing to alight, passed out upon the platform and asked the conductor to stop the car, telling him that she would not get out until the car had come to a full stop; whereupon he, and while the car was in motion, threw her from the car with great violence, breaking her leg. This was held to be a wanton and willful trespass, for which the company was not liable: *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418. An engineer acts without the scope of his authority in inviting a person to ride on the engine, and if injury is suffered by such person without further fault on the part of the engineer or other servants of the company, it is not answerable: *Chicago etc. Ry. Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380. The porter of a sleeping-car has no authority to enforce rules and regu-

lations of the company, or to forcibly prevent any person from entering the car, or to expel him therefrom after he has entered, and if he wantonly assaults and beats one who enters the car for a lawful purpose, his act is outside of the functions in which he is employed, and the company will not be liable therefor, unless it had expressly or impliedly authorized the act, or been guilty of knowingly employing a dangerous servant: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512.

A railroad company does not owe any duty to a trespasser on its trains, except to abstain from wantonly or maliciously injuring him, and if a servant of the company, in pursuing some purpose of his own, without the scope of his duties, injures such trespasser, the company is not liable: *Farber v. Missouri Pac. R. R. Co.*, 116 Mo. 81; *Alabama etc. R. R. Co. v. Harris*, 71 Miss. 74; *Mexican Nat. Ry. Co. v. Crum*, 6 Tex. Civ. App. 702. Even an employé of a railroad company may act without the scope of his employment in removing a trespasser from a train, unless he has either express or implied authority to do the act. It cannot be considered the act of the company unless he was employed generally to remove trespassers, or specifically to remove the particular trespasser: *Marion v. Chicago etc. R. R. Co.*, 59 Iowa, 428; 44 Am. Rep. 687. Compare *Lang v. New York etc. R. R. Co.*, 80 Hun, 275; *Bess v. Chesapeake etc. R. R. Co.*, 35 W. Va. 492; 29 Am. St. Rep. 820.

A railroad company is not liable for a malicious ejection of a trespasser: *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256. A railroad company is not answerable for the act of its brakeman in forcibly ejecting a trespasser from a moving train on account of his refusal to pay for the privilege of riding, if it appears that the money, which was less than the fare, was not demanded as such, but for the brakeman's personal use, and brakemen, in ejecting passengers, were required to notify the conductor and to act under his orders: *Illinois Cent. R. R. Co. v. Latham*, 72 Miss. 32. Assuming that a brakeman has authority to keep trespassers off of a railroad train, there is no presumption that he is acting within the scope of his authority in throwing a stone at a boy, with a view of injuring him, after the latter has desisted from an attempt to swing or climb upon the train; and, if the stone misses the boy, but hits another boy, the railroad company is not answerable for the injury thus done to the third person: *Georgia R. R. etc. Co. v. Wood*, 94 Ga. 124; 47 Am. St. Rep. 146. A railroad company is not answerable to a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by two or three intruders, who came into the waitingroom at the station while plaintiff was awaiting the arrival of her train, if it is not shown that the company had notice of any facts justifying the expectation of such an outrage: *Batton v. South etc. R. R. Co.*, 77 Ala. 591; 54 Am. Rep. 81. A railroad company is not liable for the death of one who, while walking on its track without right, intermeddled with a torpedo which had been placed there as a danger signal, and was killed by its explosion: *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20; 45 Am. Rep. 754. A street railroad company is not answerable for the willful and tortious acts of its servant committed outside of the scope

of his employment: *Lafitte v. New Orleans etc. R. R. Co.*, 43 La. Ann. 34. A street-car conductor is not bound to eject a passenger who addresses insulting remarks to his fellow passengers, although he is intoxicated, provided he remains quiet and inoffensive after being admonished by the conductor; and the company is not responsible for the results of a sudden, unlooked-for, and violent attack committed by him on a fellow-passenger, and ending in the death of the latter: *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190.

Independent Contractors.—If the relation of master and servant exists, the doctrine of respondeat superior applies; but, where there is an independent employment, the owner is not liable for injuries occasioned by the contractor, the subcontractor, or their servants, occurring during the prosecution of the work. A master, therefore, is not answerable unless he has not only the power to select his servant but to direct the mode of executing the work, and to so control him in his acts in the course of the employment as to prevent injury to others. Otherwise expressed, the owner, whether an individual or a corporation, and not the contractor, is liable for injury arising from negligent construction of the work, if the owner retains and exercises the right to direct the manner in which the details of the work shall be performed; but the contractor, as between him and the owner, is liable if the power of the owner to direct the construction is confined to the result of the work without any control over the manner in which it is done: *First Presbyterian Congregation v. Smith*, 163 Pa. St. 561; 43 Am. St. Rep. 808; *Robinson v. Webb*, 11 Bush, 464; *Lancaster etc. Imp. Co. v. Rhoads*, 116 Pa. St. 377; 2 Am. St. Rep. 608; *Davie v. Levy*, 39 La. Ann. 551; 4 Am. St. Rep. 225; *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925; *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234; 24 Am. St. Rep. 333; *Atlanta etc. R. R. Co. v. Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 231; *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692; *James v. McMinimy*, 93 Ky. 471; 40 Am. St. Rep. 200; *City etc. Ry. Co. v. Moores*, 80 Md. 348; 45 Am. St. Rep. 345; *Moore v. Sanborne*, 2 Mich. 519; 59 Am. Dec. 209; *Devlin v. Smith*, 89 N. Y. 470; 42 Am. Rep. 311; *Sweeny v. Murphy*, 32 La. Ann. 628; *Andrews v. Runyon*, 65 Cal. 629; *Boswell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345; *De Forrest v. Wright*, 2 Mich. 368; *Harrison v. Collins*, 86 Pa. St. 153; 27 Am. Rep. 699; *Moline v. McKenzie*, 30 Ill. App. 419; *Rogers v. Florence R. R. Co.*, 31 S. C. 378; *King v. New York etc. R. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 37; *Ellis v. Sheffield Gas etc. Co.*, 2 El. & B. 767; *West v. St. Louis etc. R. R. Co.*, 63 Ill. 545; *Arasmith v. Temple*, 11 Ill. App. 39. A contractor who has agreed to furnish facilities for the purpose of inspecting a tunnel on which he is at work does not thereby obligate himself to furnish transportation to the persons engaged in the work of inspecting; and if they, without his invitation, ride into the tunnel on a car used to bring out stone and other material, he is not answerable to them for injuries suffered by them from the negligence of one of his servants in not controlling the velocity of a descending car: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751.

So a contractor is not answerable for the wrongful acts of a sub-

contractor, as they bear the same relation to each other that the contractor does to his employer: See extended note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 201; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49.

If a contractor is employed, part of whose duties it is to make and guard an excavation, and before the work is commenced an arrangement is made between him and a subcontractor that the servants of the latter shall do the work under the control and supervision of the former, and they, in doing it, are guilty of negligence, their master is not answerable therefor, for as to such work, though employed by him, they are not his servants but the servants of the original contractor: *Cotter v. Lindgren*, 106 Cal. 602; 46 Am. St. Rep. 255. After a contractor has built a properly constructed wall, he is not liable, after its completion, for an injury caused by bricks falling from the top of the wall in consequence of an intentional or negligent act of an employé, while not acting within the scope of his employment: *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611; 53 Am. St. Rep. 88.

Fellow-servants.—The liability of a master for the negligent acts of his servant, whereby another servant is injured, does not depend upon the doctrine of respondeat superior, but upon the omission of some duty of the master which is deputed to such inferior employé. Hence, a master is not answerable, under the rule of respondeat superior, for injuries occasioned by one fellow-servant to another: Note to *Greer v. Louisville etc. R. R. Co.*, 42 Am. St. Rep. 352; *Schroeder v. Flint etc. R. R. Co.*, 103 Mich. 213; 50 Am. St. Rep. 354; *Caniff v. Blanchard Nav. Co.*, 66 Mich. 638; 11 Am. St. Rep. 541; *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336; 26 Am. St. Rep. 621.

Nonliability of Municipal and Private Corporations.—Municipal corporations fall within the general rule of law that the act done which is injurious to others must be within the scope of the employment, and furthermore, that it relates to matters about which the corporation is authorized to contract: 2 *Dillon on Municipal Corporations*, 953, 968. The liability of a city for the unauthorized acts of its officers is the subject of a monographic note to *Hilsdorf v. St. Louis*, 100 Am. Dec. 358-360. The same rules which apply to the nonliability of a master for the acts of his servant apply to private corporations as well as to municipal corporations: *Evansville etc. R. R. Co.*, 26 Ind. 70; *De Camp v. Mississippi etc. R. R. Co.*, 12 Iowa, 348; *Miller v. President etc. Burlington R. R. Co.*, 8 Neb. 219. Charitable corporations, including school districts, are not answerable for injuries or torts occasioned by the negligence or willful acts of their servants, managers, or agents: *Downes v. Harper Hospital*, 101 Mich. 555; 45 Am. St. Rep. 427; *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624; 6 Am. St. Rep. 745; *Williamson v. Louisville etc. School of Reform*, 95 Ky. 251; 44 Am. St. Rep. 243; *McDonald v. Massachusetts etc. Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648; *Ford v. Kendall etc. District*, 121 Pa. St. 543. They are not subject to the doctrine of respondeat superior. A master who sends his servant for treatment to a hospital maintained by the master for charitable purposes is not answerable for injuries caused to the servant by the negligence of the hospital attendants,

where the master has exercised ordinary care in selecting such attendants: *Union Pac. Ry. Co. v. Artist*, 60 Fed. Rep. 365; *Pierce v. Union Pac. Ry. Co.*, 66 Fed. Rep. 44.

Criminal Liability.—A master is not answerable criminally for the act of his servant or agent, unless he has in some way participated in or countenanced it: *Note to Gulf etc. Ry. Co. v. Reed*, 26 Am. St. Rep. 755; *Commonwealth v. Stevens*, 153 Mass. 421; 25 Am. St. Rep. 647, and note; *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446.

Joint Liability.—Master and servant are not jointly liable for the servant's negligence, in the master's absence, in so driving a team as to cause an injury to another: *Parsons v. Winchell*, 5 Cush. 592; 52 Am. Dec. 745; or for an injury done by a servant to a horse hired by the master: *Banfield v. Whipple*, 10 Allen, 27; 87 Am. Dec. 618; or if the carriage, at the time of the injury, is not employed in the business of the master: *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507. See note to *Parsons v. Winchell*, 52 Am. Dec. 748, on the joint liability of the master and servant for the servant's negligence or tortious act.

COMER v. WAY.

[107 ALABAMA, 300.]

ACCOUNTS—VERIFICATION OF, BY AFFIDAVIT.—The statute of Alabama authorizes an open, but not a stated, account, to be verified by the affidavit of a competent witness.

AN ACCOUNT STATED is an account balanced, and rendered, with an assent to the balance, express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance.

APPEAL—WAIVER OF REPLICATION.—If a case is tried without a replication to a plea, as if it had been properly interposed, the defendant will be treated, on appeal, as having waived it. Hence, if a factor, who has sold cotton for his principal, sues the latter for money due upon an account stated, and the principal pleads that the sale was unauthorized, and the case is tried without a replication setting up a ratification of the sale, evidence of its ratification being received without objection by the defendant, the principal will be held, on appeal, to have waived such replication.

EVIDENCE—VALUE OF GOODS AT PARTICULAR PLACE. In determining the value of goods at a particular place, evidence of the value at other places than the place in question is inadmissible, where the evidence is clear that there is a value at that place.

FACTORS—UNAUTHORIZED SALE AT PLACE NOT CONTEMPLATED—LIABILITY.—If a factor reships goods consigned to him by his principal, without the latter's advice, and they are sold at less than they might have been sold for at the place of shipment, where, in the contemplation of the parties, they were designed to be sold, he is liable for the difference in price for which they were sold and the market value at the place where it was intended that they should be sold.

A FACTOR HAS A GENERAL LIEN upon goods consigned to him and the proceeds of their sale for advances and commissions consequent upon their reception, safekeeping, and sale.

TIME—REASONABLE—MIXED QUESTION OF LAW AND FACT.—The time within which an act is to be performed, when no time is specified, is within a reasonable time, which is often a mixed question of law and fact. If the facts are not in conflict, it is a question for the court, and it is error to submit it to the jury; but, if the facts are in dispute, it is the duty of the court to submit them to the jury.

FACTORS—RATIFICATION OF UNAUTHORIZED SALE—MATTER OF LAW.—If a principal is dissatisfied with his factor's sale, and is fully informed of what has been done, he must express his dissatisfaction within a reasonable time, or be held to have ratified the sale. Hence, if the factor, who has made large advances, reships cotton consigned to him by his principal, and makes an unauthorized sale of it at a place other than that at which it was to have been sold, and at a price claimed by him to have been in advance of that which he would have received had the cotton been sold at the place contemplated, and the principal is informed of the transaction by a statement and account of sales, showing that the net proceeds have been placed to his credit, leaving a balance due the factor, the principal's failure for four months thereafter to make any objection to the sale, or to the application of the proceeds to his credit, is, as a matter of law, a ratification of the sale.

Action brought by the appellants, Comer & Co., against the appellees, Way & Edmundson. The complaint had two counts, one claiming \$946.55, due by account stated on December 5, 1895; the other claiming the same amount as due for money paid by the plaintiffs for the defendant. The account sued on was verified by affidavit, and the plaintiffs, at the time of bringing their suit, indorsed on the summons and complaint that the account was so verified. The transaction giving rise to the litigation was a sale of long staple cotton shipped by the appellees to the appellants, who were commission merchants and factors in Savannah, Georgia. The cotton was to have been sold in Savannah, but as the market there for such cotton was limited and spasmodic, and as the factors had made heavy advances on the cotton, they shipped it to Liverpool, and sold it there. The defendant filed four pleas upon which issue was joined, there being no replications filed. The defendants objected to the introduction in evidence of the verified account. The objection was sustained, and the court refused to allow it to be introduced in evidence. There was a judgment for the defendants, and the plaintiffs appealed.

G. L. Comer, for the appellants.

A. H. Merrill and S. H. Dent, Jr., for the appellees.

307 HARALSON, J. 1. The account referred to in section 2773 of the code, which may be verified by affidavit of a competent witness, taken in the manner and subject to the conditions therein prescribed, is, we apprehend, an open and not a stated ac-

count. The fact that the verified account should contain a statement of its items would so indicate; and, besides, to maintain an action on an account stated, the plaintiff must prove the fact of its statement; it must be proved as laid to authorize a recovery—that and nothing else will support his allegation in the complaint. If the plaintiff make that proof, he is entitled to judgment; otherwise not. As has been said, “an account stated is an account balanced, and rendered, with an assent to the balance, express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance”: *Loventhal v. Morris*, 103 Ala. 336; *Bass v. Bass*, 8 Pick. 187. The affidavit authorized by the statute seems, therefore, to be inapplicable to a suit on an account stated, and there was no error in the ruling of the court so holding: *McCamant v. Batsell*, 59 Tex. 363.

The defendant filed four pleas, upon which the plaintiff took issue, without special replication to either. If either of these pleas was bad when tested on demurrer, or if its defects might have been avoided by special replication, setting up other facts to that end, still, if without this, issue was taken on a defective or imperfect plea, instead of forcing an issue, in the manner indicated, on the real and meritorious facts, and the facts as set up in the plea were substantially proved—the defendants having done or suffered nothing to waive their right to a replication—the plaintiff was entitled to a judgment thereon, and the general charge, if requested, might have been given on the plea. But another well-recognized principle must not be overlooked—that when a case is tried, as though upon an issue on which it is not triable, on the pleadings as set out, this court on review will treat the case as though the proper issue had been made up, such as the course of trial indicates was proper to have been made, and that a failure to interpose the proper plea, was waived—as where there is no plea by ³⁰⁸ defendant of contributory negligence, on the part of plaintiff in an action for alleged injuries to him by the defendant, and the parties proceed without such plea to trial of the case on the issue of contributory negligence as though pleaded, the fact that such a plea was not interposed will be deemed to have been waived: *Richmond etc. R. R. v. Farmer*, 97 Ala. 141; *Kansas City etc. R. R. Co. v. Burton*, 97 Ala. 240; *Andrews v. Birmingham etc. R. R. Co.*, 99 Ala. 438; *Payne v. Crawford*, 102 Ala. 387; In the case before us, there was no replication to the second plea, setting up a ratification by defendants of the shipment and sale by plaintiffs of their cotton in Liverpool, in the manner stated in said second plea, without their knowledge and consent; but the case was tried and evidence of ratification of such shipment and

sale was received without objection by defendants, as though a proper replication to the plea, setting up such ratification, had been interposed. We must, therefore, treat the defendants as having waived the replication of ratification, and that they tried the cause as though such replication had been properly interposed.

2. The proof tends to show that the two hundred bales of long staple cotton belonged to the defendants; that they bought and shipped it in December, 1892, and January, 1893, from Eufaula, Alabama, where they lived, paying the freights on it, to the plaintiffs in Savannah, Georgia, for sale on account; that plaintiffs advanced to defendants nine and one-half cents per pound on the cotton at the time of that shipment; that during the months of January, February, and March, 1893, they informed defendants, at different times, that the market for such cotton was limited and spasmodic, and that there was no market at that time for said cotton in Savannah at a premium, and advised defendants to have said cotton shipped to Liverpool, England, for sale, but that defendants would not consent thereto, and objected to such shipment, and instructed them not to ship it; that complainants then requested from defendants, for their own protection, a margin of one thousand dollars on the cotton, with which request defendants refused to comply; that said cotton was consigned, nevertheless, by plaintiffs to Liverpool, about the 10th of April, 1893, without the knowledge of defendants, and there sold, in the months of May, June, July, and August of that year, on account of defendants; ³⁰⁰ that on the 5th of December, 1893, plaintiffs sent to defendants a statement of their account, with an account sales of the two hundred bales of cotton, showing the balance nine hundred and forty-six dollars and fifty-five cents here sued for, and requesting a remittance of the same, to which defendants made no reply, although the letter and account as stated was received the next day, December 6, 1893. On December 19, 1893, the plaintiffs again wrote to defendants, calling their attention to the fact that on December 5th, they had sent them a statement of the two hundred bales of long staple cotton, which they stated in the letter they had shipped for defendants' account to Babcock & Co., Liverpool, and asking if the letter and statement had been received, and requesting a remittance of the balance due as stated due to plaintiffs. This letter was received on the 20th of December, 1893, but defendants made no reply thereto. On January 2, 1894, plaintiffs wrote again to defendants, requesting a reply to their letter of the 19th, which letter was received by defendants the day after it was written, but no

reply was made to it. Plaintiffs further proved that from the 5th of December, 1893, the date they transmitted their statement of accounts to defendants showing balance of the amount here sued for, until the 1st of April, 1894, after their account had been placed in the hands of their attorney for collection, defendants had made no objection of any kind to the same. When presented by their attorney on April 1, 1894, defendants declined to pay it, and this, so far as the evidence shows, was the first and only reply they made to plaintiffs after they sent them their statement of December 5, 1893. This proof on the part of the plaintiffs was received without objection, and is without conflict of other evidence.

It was further shown that defendants had shipped to plaintiffs for sale during the season other large lots of cotton, and there was proof tending to show that the accounts between them, except for this lot of two hundred bales, had been settled.

The defendants offered evidence to show that said cotton, in January, 1893, was worth in Falls River, Massachusetts, eleven and one-half cents per pound, to which evidence plaintiffs objected, on the ground of its being illegal and incompetent, but the court admitted it, and the plaintiffs excepted. The defendants offered, in this connection, to prove the freight rate from Savannah to Falls River, but, ³¹⁰ on the objection of plaintiffs, it was not allowed by the court.

This cotton, as the evidence tends to show, was shipped by defendants to plaintiffs at Savannah, to be there sold. There is no evidence that it was in the contemplation of the parties to have it sold elsewhere, and it is shown that there was always a market for it in Savannah, but not at such a price as the plaintiffs, representing defendants, were willing to take for it. The proof on the part of the defendants is, that it was worth eleven cents per pound at the time it was shipped from Savannah, and that on the part of plaintiffs that it was not worth more than nine and one-half cents per pound at that time.

The rule, as laid down by Sutherland, in his work on Damages, on the proof of value, which seems consonant with reason and well supported by authority is, that "where the question is, What was the value at a particular place? and there was no market value there, proof may be given of the market value at other places, with the cost of transportation, or other facts that will enable the jury to deduce the value at the place in question. Evidence of the value at other places than the place in question is inadmissible, where the evidence is clear that there is a value at that place": 1 Sutherland on Damages, 796; 1 Sedgwick on Dam-

ages, 586, 590, and notes; 3 Am. & Eng. Ency. of Law, 326. And a proper rule as settled is, that where a factor reships goods consigned to him by his principal, without the latter's advice, and they are sold at less than they might have been sold for at the place of shipment, where, in the contemplation of the parties they were designed to be sold, he will be liable for the difference in the price for which they were sold and the market value of the goods at the first port: *Grieff v. Cowguill*, 2 Disn. 58; 3 Am. & Eng. Ency. of Law, 326.

It is undeniably true, also, that a factor has a general lien upon goods consigned to him and the proceeds of their sale for advances and commissions consequent upon their reception, safe-keeping, and sale: *Martin v. Pope*, 6 Ala. 532; 41 Am. Dec. 66; *Schiffer v. Feagin*, 51 Ala. 335; 3 Ency. of Law, 333.

Applying these principles, then, to the case in hand, and it seems clear that proof of the market value at ³¹¹ Falls River, a remote market, when the proof tended to show that there was a market for the cotton at Savannah equal or nearly so to that at Falls River, was improper to be made. It is also clear that plaintiffs ought not to have shipped the cotton to Liverpool for sale, contrary to the instructions of their principals, when it might have been sold in Savannah, unless they chose to do so at their own risk, assuming the risk of any damage they might thereby do the defendants by a failure to sell in Savannah.

3. The time within which an act is to be performed, when no time is specified, is within a reasonable time. What this is, is often a mixed question of law and fact. When the facts are not in conflict, it is a question for the court, but if any of the facts bearing on the case are in question, it becomes the duty of the court to submit them to the jury: 2 *Parsons on Contracts*, 535. The facts as to time in this case are not in dispute. The first charge, notwithstanding, submits the question of reasonable time to the jury. It was a question for the court.

4. The second and the third charges requested by the plaintiffs should have been given. The defendants were notified of the sale of the cotton, and received the account sales of it by letter dated the 5th of December, 1893, which they received the following day, informing them that the net proceeds had been placed to their credit. They made no objection to the sale, nor to the application of the proceeds to their credit, until after April 1, 1894—the space of about four months. The charges, hypothesizing such a state of facts, requested the instruction that such delay, upon such information, must be treated as a ratification of the Liverpool sale. The evidence shows that after December

5th, plaintiffs wrote again on December 19th, and January 2, 1894, which letters were received, the first requesting a reply and a remittance, and the other requesting the reply to the one of 19th of December, but to which defendants made no replies, and remained silent, as we have seen, until after April 1, 1894, when the attorney for plaintiffs presented the account to them.

In *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617, the court says: "The course of business between the factor and his correspondents implies prompt responses to business ³¹² letters. If the factor advises his correspondents of his acts with respect to his property, and he does not in a reasonable time disaffirm and so notify the agent, the latter may well presume that his conduct has been approved. So large a part of the commerce of the world is done through agents of one sort or another that it is necessary that this principle should prevail. Hence it is incorporated into all the systems of jurisprudence: Story on Agency, sec. 258. The principle must disaffirm. Silence will be equivalent to approval." The court add: "The principal, within a reasonable time, must elect to approve or disapprove the unauthorized act of the agent of which he has been informed. He cannot remain silent and await the vicissitudes of a fluctuating market, and if the price rises, disaffirm and claim the difference; or, if it declines, acquiesce in the sale."

In *Powell v. Henry*, 27 Ala. 612, it was held that if an agent exceeds his authority, although the principal may ratify the act, yet, to avoid it, he is not obliged to give notice that he repudiates it." In *Mobile etc. R. R. Co. v. Jay*, 65 Ala. 116, it was held that this was a too comprehensive statement of the law, and the better doctrine was there expressed that in cases where the party dealing with an agent is misled or prejudiced by him, or where the usage of trade requires, or fair dealing demands, the principal, if dissatisfied with the act of the agent, and is fully informed of what has been done, must express his dissatisfaction within a reasonable time: *Burns v. Campbell*, 71 Ala. 273; *Clark v. Taylor*, 68 Ala. 461; *Central R. R. etc. Co. v. Cheatham*, 85 Ala. 300; 7 Am. St. Rep. 48; *Raymond v. Palmer*, 41 La. Ann. 425; 17 Am. St. Rep. 398; *Ward v. Warfield*, 3 La. Ann. 468; 1 Am. & Eng. Ency. of Law, 439, 440, and authorities cited.

For the errors indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

AN ACCOUNT STATED is "an agreement between persons who have had previous transactions, fixing the amount due in respect of

such transactions, and promising payment": See monographic note to Lockwood v. Thorne, 62 Am. Dec. 85, on account stated.

EVIDENCE OF THE VALUE OF PERSONAL PROPERTY in a distant market is not admissible to prove the value of such property in the local market, unless it is proved that there is no adequate local market, or that the two markets are interdependent and sympathetic: Jones v. St. Louis etc. Ry. Co., 53 Ark. 27; 22 Am. St. Rep. 175, and note, showing that the value of four bales of cotton in a city in Georgia cannot be proved by showing the value of six bales of cotton in a city in Ohio.

REASONABLE TIME—QUESTION OF LAW OR FACT.—If a contract is silent as to the time in which it is to be performed, the law allows a reasonable time. If the facts are not in conflict, the question as to what constitutes a reasonable time is one of law, otherwise, it is a question of fact, to be left to the jury, with appropriate instructions: See monographic note to Aymar v. Beers, 17 Am. Dec. 548, on when reasonable time is a question of law.

FACTORS—LIEN—SALES, PLACE AND PRICE.—A factor has a general lien on goods of his principal in his possession, their proceeds and securities taken for the price, for advances, expenses, and commissions, and extending to the general balance of his accounts, but not to debts outside the agency: Note to Barnes etc. Co. v. Bloch etc. Co., 45 Am. St. Rep. 852. It has been held that factors may, by custom, send goods away from their place of residence for sale, but it has been questioned whether the rule requiring the sale to be made in such place can be changed by usage or custom: See monographic note to Bigelow v. Walker, 58 Am. Dec. 163, on factors. As a general rule, factors, like other agents, must obey the instructions of their principals; and these instructions are generally given in reference to the time and manner of sale: Note to Bigelow v. Walker, 58 Am. Dec. 159. The single fact that a factor has made advances does not authorize him to sell for a less price than that fixed by his principal, but he may sell upon notifying his principal to sell within a reasonable time: Note to Sims v. Miller, 34 Am. St. Rep. 765. If a consignment is made to a factor for sale, without instructions, it may be presumed, in the absence of established usage to the contrary, that the produce is intended to be sold at the place of the residence of the factor: Phillips v. Scott, 43 Mo. 86; 97 Am. Dec. 569.

FACTORS—WRONGFUL SALE—MEASURE OF DAMAGES.—A factor who wrongfully sells goods of his principal below the price limited in his instructions is presumptively liable for damages as if the limited price were the true value of the goods; but evidence that the limited price could not have been realized, and that the market value at the time of sale and after was less than that price, is competent to reduce the recovery to such market value with interest: Blot v. Boiceau, 3 N. Y. 78; 51 Am. Dec. 345, and note.

NATIONAL FERTILIZER COMPANY v. HOLLAND.

[107 ALABAMA, 412.]

MOTIONS—SUPPRESSION OF DEPOSITIONS.—The mere announcement of the parties that they are ready for trial is not such an entering on the trial as to preclude a party from making a motion to suppress a deposition.

TRIAL—READINESS TO PROCEED—DETERMINATION OF QUESTIONS.—The court has the right to demand of the parties whether they are ready before he is required to hear and determine any question connected with the cause.

DEPOSITIONS—MAY BE SUPPRESSED, WHEN.—It is proper for the court to suppress a deposition, taken by interrogatories, if the opposite party has not been served with written notice as prescribed by the code, and had the statutory time within which to file cross-interrogatories, even where the motion to suppress is not made until after the parties have announced themselves ready for trial.

APPEAL—INDEFINITE ASSIGNMENT OF ERROR.—An appellate court will decline to consider an uncertain and indefinite assignment of error. It should specify the particular error complained of, especially where the judgment entry and bill of exceptions are not consistent. An assignment that the court erred in not granting one of three motions is too indefinite to be considered.

ASSOCIATIONS—WITHHOLDING BOOKS CONTAINING EVIDENCE—RESOLUTIONS AS TO CONTRACT.—No organization, or the members thereof, can, in a suit upon a contract made by it, or them, with other persons, or the public, withhold evidence of the contract on the ground that it is a secret order, and that the production of the books, which contain the evidence, will expose its secrets; nor can such organization, or persons, determine the legal effect of its resolutions, pertaining to the matter of the contract.

EVIDENCE—COMPELLING PRODUCTION OF BOOKS—ATTACHMENT.—It is only those who have the custody or control of books sought to be put in evidence that can be required to produce them, and a motion to attach parties who have not the custody of the books, or the authority to produce them, cannot be granted.

Action of assumpsit brought by the appellant, the National Fertilizer Company, against the appellees, Holland and others, upon a promissory note, alleged to have been executed to the plaintiff by the defendants. After the case was called for trial, and after the parties had announced themselves ready, the defendants moved to suppress the deposition of one J. B. Reid, which had been taken by the plaintiff in the cause, for want of written notice and an opportunity to file cross-interrogatories. The only notice given was that to defendant's attorney, by the commissioner named to take the deposition, of the time and place of taking it, on the interrogatories filed by the plaintiff, under section 2802 et seq. of the code of 1886. The motion to suppress the deposition was sustained, whereupon the plaintiff then read to the court interrogatories propounded by the plaintiff to the defendants under section 2816 et seq. of the code of 1886, in

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which the plaintiff asked the defendants to attach to their answer the book kept by the Mt. Pleasant Alliance containing a record of all the proceedings during the years 1889 and 1890 of said alliance. All the witnesses were members of this organization. The plaintiff, after these interrogatories and the answers thereto were read in evidence, moved the court to attach the defendants, and to cause them to answer fully in open court. This motion was overruled by the court. The plaintiff then moved the court to enter judgment by default against the defendants. This motion was also overruled. A motion was then made by the plaintiff to continue the cause until full answers to said interrogatories were made by the defendants. This motion was likewise refused. Each of the foregoing motions was made upon the ground that the answer filed by the defendants to the interrogatories propounded to them by the plaintiff were not full, but evasive, in this, that the defendants failed to attach to said answers the book or books containing the record of the proceedings had by the Mt. Pleasant Alliance during the years 1889 and 1890. It was recited in the bill of exceptions that: "Counsel for plaintiff stated to the court that he expected to show by said books that said alliance, of which all the defendants were members, introduced and passed resolutions authorizing the purchase of guano from the plaintiff, and that the note sued on in this action be given therefor, and that said books showed the date, amount, and names of persons signing it. Counsel for defendants, in reply, stated that such books contained no such entries as alleged by the plaintiff's counsel; that there were other entries that were of a private character; and plaintiff had demanded the entire books in the interrogatories filed, and the defendants refused to surrender the entire books." The defendants all swore that there was nothing in said books showing such facts as stated by the plaintiff's counsel. It was then stated in the bill of exceptions that: "In consequence of the adverse rulings of the court in suppressing the deposition of J. B. Reid, and in refusing to grant the several motions heretofore noted, the plaintiff was unable to proceed further, and was compelled to take a nonsuit." The plaintiff appealed, assigning as error the ruling of the court in suppressing the deposition of the witness, Reid; but the other rulings of the court were assigned as follows: "The court below erred in its action on the several motions made by appellant—it should have granted one of the three motions."

M. E. Milligan, for the appellat.

416 COLFMAN, J. The mere announcement of the parties that they are ready for trial is not such an entering on the trial

as to preclude a party from making a motion to suppress a deposition: Code, sec. 2810. The court has the right to demand of the parties whether they are ready before he is required to hear and determine any question connected with the cause. The rule declared in *Morgan v. Wing*, 58 Ala. 301, will not be extended further than as therein stated. Interrogatories were propounded by the plaintiff under subdivision 5 of section 2801 of the code, and filed with the clerk. The motion to suppress the deposition was based upon the ground that the opposite party had not been served with notice of the filing of the interrogatories and had no opportunity to file cross-interrogatories. A party has the right, upon making affidavit, to take the deposition of a witness *ore tenus* under section 2801, except as to subdivision 3, after proper notice to the adverse party. If, however, he proceeds to take testimony under either subdivision by interrogatories filed with the clerk of the court, the opposite party is entitled to notice in writing, who has ten days thereafter to file cross-interrogatories: Code, sec. 2803. The court did not err in suppressing the deposition.

The judgment entry and bill of exceptions are not consistent. The judgment entry states: "This day came the parties by their attorneys, and the defendant moves the court to suppress the deposition of J. B. Reid, which was considered by the court, and the deposition suppressed. Thereupon the plaintiff makes known to the court that it will take a nonsuit; it is, therefore, considered by the court that a nonsuit be entered," etc. The bill of exceptions states that after the suppression of the deposition of J. B. Reid, the plaintiff read to the court interrogatories filed by the plaintiff to the defendants under section 2816 of the code, and answers thereto, and moved the court, under section 2820: 1. To attach the parties; 2. To continue the cause until full answers are made; or 3. To direct a judgment by default; each of which motions was based upon the averment that the answers were not full, or were evasive. The motions ⁴¹⁷ were overruled by the court. The judgment entry recites that the nonsuit was entered in consequence of the suppression of the deposition of Reid, whereas the bill of exceptions shows that the nonsuit was suffered in consequence of the suppression of the deposition of Reid and the adverse rulings of the court upon the said several motions. Whether the judgment entry should prevail or not, the assignment of error as to the action of the court upon the motions of the plaintiff is too indefinite to call for any adjudication by this court. It is, in effect, that the court "should have granted one of the three motions." The ruling of the court upon each of the motions might have been matter for separate assignments of er-

ror, but when the assignment is that the court erred in not granting one of the three motions, without specifying the particular error complained of, the assignment is so uncertain and indefinite that we will decline to consider it: *Cobb v. Malone*, 92 Ala. 630; *Mobile v. Murphree*, 96 Ala. 141.

No organization, or the members thereof, can withhold the evidence of contracts made by it or them with other persons or the public on the ground that it is a secret order, and the production of the books which contain the evidence will expose its secrets, nor can such organization or persons determine the legal effect of its resolutions pertaining to the matter of the contract. Only those who have the custody or control of the books can be required to produce them, and a motion to attach parties who have not the custody of the books, or the authority to produce them, cannot be granted.

We find no error in the record.

Affirmed.

DEPOSITIONS—SUPPRESSION OF.—Objection to the manner and form of taking a deposition must be made at the time the deposition is taken. It cannot be made for the first time at the trial: *International etc. Ry. Co. v. Prince*, 77 Tex. 560; 19 Am. St. Rep. 795. If the objection is not made before trial and notice given to the opposite party, the deposition cannot be excluded when offered in evidence on the trial: *Missouri Pac. Ry. Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758. The court may refuse to entertain a motion for the suppression of an entire deposition, where the motion is made after the trial has commenced: *McArthur v. Carrie*, 32 Ala. 75; 70 Am. Dec. 529.

APPEAL—INDEFINITE ASSIGNMENT OF ERROR.—All assignments of error should point to the particular part of the proceedings of the court below in which the error complained of is thought to exist: *Eslava v. Lepretre*, 21 Ala. 504; 56 Am. Dec. 266; *Michigan etc. R. R. Co. v. Day*, 20 Ill. 375; 71 Am. Dec. 278.

EVIDENCE—COMPELLING PRODUCTION OF BOOKS.—To justify an order for the production of a book, it should be shown to be in the hands of the party against whom such order is asked, as a court will not compel a party on motion to produce papers, until it appears that he has them under his control. A corporation may be compelled, through its officers, to produce books and papers in like manner as if it were a natural person. An order for the production of documents is enforced by attachment, or process of contempt: See monographic notes to *State v. Davis*, 32 Am. St. Rep. 648, on the right of a person to protection of books and papers from examination, and *Lester v. People*, 41 Am. St. Rep. 391, 396, on the power to compel a party to produce books and papers as evidence, or for the examination of his adversary.

CURRY v. AMERICAN FREEHOLD LAND MORTGAGE Co.

[107 ALABAMA, 429.]

HUSBAND AND WIFE—JOINDER OF WIFE IN HUSBAND'S DEED—COVENANTS.—The legal effect of a wife's joining in the deed of her husband is to release her dower and effectuate a valid alienation of the homestead. She is not a covenantor in the covenants of seisin, warranty, and against encumbrances, contained in the instrument. Such covenants proceed from, and bind, the husband alone.

CONTRACTS—LAW GOVERNING, AS TO TIME.—The rights of parties are governed by the law in force at the time when the transactions between them took place.

HUSBAND AND WIFE—VALIDITY OF MORTGAGE BY WIFE.—Prior to February, 1887, when the new married woman's law of Alabama was enacted, a mortgage made by a married woman in that state, with or without her husband, of her statutory separate estate, except for the purpose of securing purchase money of the land mortgaged, was null and void, inoperative as a conveyance at law, or an estoppel in equity.

HUSBAND AND WIFE—LIEN RESERVED TO WIFE IN DEED—MORTGAGE—ESTOPPEL—TORT FEASOR.—Under the married woman's law of Alabama in existence prior to February, 1887, the joinder of a wife in a mortgage by her husband of land conveyed to him by deed, which deed expressly reserved to the wife a prior lien on the land to secure an indebtedness of the grantor to her, operated merely as a relinquishment of her dower and of the homestead, and did not estop her from afterward asserting the superiority of her lien over that of the mortgagee, even where the mortgage contained general covenants of seisin, warranty of title, and against encumbrances; and her repudiation of such covenants was not a fraud which justified dealing with her as a tortfeasor.

Bill filed by the appellant, Curry, to enforce a lien in her favor as being paramount to a lien held by the appellee, the American Freehold Land Mortgage Company of London, Limited, under a mortgage executed to it by Burwell J. Curry, the husband of the complainant, and in which she joined. Her lien was decreed not to be paramount to that in favor of the company, by reason of the mortgage to it conveying the land in question, but subordinate thereto. The complainant appealed.

Shelby & Pleasants and Richard W. Walker, for the appellant.

James E. Webb and Caldwell Bradshaw, for the appellee.

⁴³⁴ **HEAD, J.** On November 28, 1877, F. L. Hammond, being indebted to the complainant, Bettie H. Curry, who was his daughter, in the sum of thirteen hundred and seventy-seven dollars and eighteen cents, and to Burwell J. Curry, her husband, in the sum of twelve thousand three hundred and thirty dollars and fifteen cents, conveyed, by deed, to said Burwell J. the lands which form the subject matter of this suit, in payment of the latter indebtedness, but declaring, in the deed, by appropriate

words, a prior and paramount charge or lien upon the lands in favor of the complainant, the said Bettie H., for the security of the said indebtedness to her.

On May 7, 1886, the said Burwell J. Curry borrowed of the defendant, the American Freehold Land Mortgage Company of London, Limited, the sum of ten thousand dollars, ⁴³⁵ and, to secure the payment of the same, in stipulated installments, together with interest coupons attached, executed to that company a mortgage on said lands. Mrs. Curry, the complainant, described as the wife of the said Burwell J., joined in the execution of this mortgage, and acknowledged the same in the manner required by law to bar the husband's homestead, as well as in the general form prescribed by the statute for the acknowledgment of conveyances. Among other special stipulations not necessary to be noticed, the mortgage contained general covenants of seisin, warranty, and against encumbrances. At the same time, they executed a second mortgage on the premises to Joseph H. Sloss, to secure a debt of one thousand dollars. This mortgage need not be further noticed. Burwell J. Curry made default in the payment of the ten thousand dollar mortgage, and the company proceeded to foreclose under the power of sale, and advertised the lands for sale on a specified day, sold the same, and itself became the purchaser. Mrs. Curry filed her bill to enforce her lien on the lands secured to her by the deed of Hammond to her husband, as a prior charge, and the sole question, as the case comes before us, is whether she waived her paramount lien by joining with her husband in the said mortgage. Upon two considerations it seems very clear to us that she is not estopped.

1. It is not questioned, as the written application for the loan made by Burwell J. Curry shows, that the loan was to him individually. He was the legal owner of the lands and they were mortgaged, as his property, to secure the loan. To perfect the security, it was necessary that the wife release her dower, and sign the conveyance, so as to bar the husband's homestead. Section 1894 of the code of 1886 provides how dower may be relinquished. It provides that the wife may relinquish her dower in land by joining with her husband in a conveyance thereof, or by joining with her husband in a power of attorney authorizing the attorney to convey the lands, or subsequently to a conveyance thereof by the husband, by a separate instrument executed by her alone; and, in either case, her signature must be attested by two witnesses who are able to write, or acknowledged by her according to the form prescribed for the acknowledgment of other conveyances in this state; and section 1899 provides, that

"neither the wife individually, nor ⁴³⁶ her separate estate, is bound by the covenant of warranty contained in any deed conveying land belonging to the husband, executed by such wife in connection with her husband; but such deed shall have the effect only of a relinquishment of dower, unless there be in the deed a special covenant of the wife, expressing her intention to bind her separate estate." Under these provisions, there would seem to be no room for doubt that no effect can properly be accorded to the execution of the mortgage by Mrs. Curry jointly with her husband, other than the relinquishment of dower, and effectuate a valid alienation of the homestead. In legal effect, she is not a covenantor in the covenants of seisin, warranty, and against encumbrances contained in the instrument. Those covenants proceed from, and bind, the husband alone. Such is not only the provision of the statute, above copied, properly construed, but it was so held upon general principles of law, independently of an expressed statutory provision. In *Gonzales v. Hukil*, 49 Ala. 260, 20 Am. Rep. 282, we said: "The joint conveyance of land by husband and wife, as his property, does not estop the wife from setting up a title subsequently acquired. She is not *sui juris*, except to relinquish her dower": Citing *Tyler on Infancy and Coverture*, 316; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Teal v. Wordsworth*, 3 Paige, 470. Relinquishment of the dower, and of the homestead, being, then, the sole purpose and effect of the wife's joining in the instrument, there can be neither conveyance by warranty nor quitclaim, by virtue of such a deed, of any right or interest held by her, other than dower, in the premises conveyed. To have the contrary effect, there must, at least, be a special stipulation on the part of the wife, expressly showing an intention on her part to part with her interest in the land. The indebtedness of Mr. Hammond to complainant, and the trust created for its security, was the statutory separate estate of Mrs. Curry, governed by the statute laws of Alabama, then in force, as distinguished from a separate estate by contract, known at the common law, and which was not displaced by the statutory system then obtaining. Such was the status of the estate until the new married woman's law of February, 1887, was enacted, which wrought very material changes in the old law. The transactions involved in the present controversy ⁴³⁷ having taken place prior to the enactment of the new law, the rights of the parties are governed by the old. Perhaps no subject of our code of statute law underwent more frequent exposition by this court than the old married woman's law above referred to; and one principle settled by an unbroken line of our

decisions, during the long period of the law's existence, is, that a mortgage made by a married woman, with or without her husband, of her statutory separate estate (except for the purpose of securing purchase money of the land mortgaged) was null and void, inoperative as a conveyance at law, or an estoppel in equity. This principle is too well understood in this state to be now discussed. We are referred to the case of *Wilder v. Wilder*, 89 Ala. 414, 18 Am. St. Rep. 130, and it is insisted for appellee that the decision there is authority for the proposition that the mortgage in which Mrs. Curry joined operates to estop her to assert her equity. We do not so understand the case. Indeed, Judge Somerville, in delivering the opinion, fully recognizes the principle we mention. After showing that a deed of a married woman of her statutory separate estate, not executed in conformity to statutory authority, is a nullity as a conveyance, he proceeds, upon the subject of estoppel, to use this language: "The reason upon which these decisions rest is, that the statute prescribes and restricts the mode of alienation by married women of their separate estates; and to allow title to be conferred by equitable estoppel would introduce a new mode of alienation different from that thus prescribed, and would result in sanctioning indirectly the conveyance by *femes covert* of their property, when they were prohibited by statute from doing directly the same act in the mode attempted." Several of our decisions are cited. There is nothing in the opinion evincing the least purpose to overturn this doctrine or the decisions which support it. The case was withdrawn from its operation by its peculiar facts. Mrs. Wilder and her husband, in pursuance of the statute, sold a tract of land to Sydney T. Wilder, for part cash and part on time. The deferred purchase money constituted, if not legally waived, a vendor's lien on the land in favor of Mrs. Wilder. To enable the purchaser to borrow the money of a loan company with which to make the cash payment, it was agreed by all parties that the company should take a paramount ⁴³⁸ mortgage on the land to secure the loan, and that Mrs. Wilder should take a second and subordinate mortgage to secure the deferred purchase money, thus waiving her vendor's lien in favor of the loan company. She afterward filed her bill to assert a paramount lien as vendor, and the question was whether she was estopped. The court, holding that she was, placed its decision upon the ground that, by the statute, a married woman, by the joint deed of herself and husband, could lawfully make absolute sale of her separate property; that this power carried with it authority to sell on credit, and secure the payment of the purchase money by such means as the parties

might agree upon; and, therefore, as an incident to the power to sell, it was competent for the wife, to enable the purchaser to raise the money to make the cash payment to her, to accept a second mortgage in lieu of the retention of her paramount lien as a vendor; and, this having been done, she was denied relief. It is manifest there is nothing in common between that case and the present. Then, if it were conceded that the mortgage in question could be treated as the deed of Mrs. Curry, purporting to convey, by warranty, the land as her property, and not, on its face, a mere relinquishment of dower and homestead, its utter invalidity, under the statute, must necessarily be pronounced.

There is, in the covenants of this mortgage, no element of misrepresentation of fact, as suggested by counsel, upon which the mortgagee was induced to rely, which renders Mrs. Curry's repudiation of them, if they had proceeded from her, tortious in its nature. They (those referred to by counsel) are the covenants of seisin, warranty of title, and against encumbrances usually found in deeds and mortgages of real estate, and are purely contractual in their nature. It has never been supposed that the breach of one or all of these covenants, influenced by no other misrepresentation of fact, constituted a fraud on the part of the covenantor which justified dealing with him as a tortfeasor.

The chancellor's decree was not in accord with our views and must be reversed. The cross-bill of the defendant company to marshal the assets was dismissed by the chancellor, and there is no cross-appeal; hence, that matter is not before us. A cross-bill is essential to obtain the relief sought. The dismissal was, however, ⁴³⁹ without prejudice, and we will remand the cause that the defendant company may, if so advised, refile its cross bill, and, if the facts justify, have the assets marshaled. We have given no consideration to the merits of that branch of the case, and do not intimate that the present record makes a case for the relief sought by the cross-bill. The chancellor will, on the hearing, render a decree establishing the superiority of complainant's lien, and decreeing her appropriate relief, and, if the pleadings and proof then so require, let the assets be so marshaled as that justice will be done.

Reversed and remanded.

HUSBAND AND WIFE—COVENANTS OF WIFE IN DEED—ESTOPPEL.—A feme covert is not bound by covenants contained in her deed; and could not, at common law, bar herself, or her heirs, of her dower in her husband's land, by joining with him in any deed or conveyance: *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245. Under statutes permitting a wife to convey her lands by uniting in a joint deed with her husband, with covenants of warranty, she is only en-

abled to pass her title, and is not liable upon a breach of the covenants of warranty: See monographic note to *Nash v. Spofford*, 43 Am. Dec. 426, on deed of married woman with covenants or warranty; *Wadleigh v. Glines*, 6 N. H. 17; 23 Am. Dec. 705. A general covenant of warranty in such a deed binds the husband, but not the wife: *Griner v. Butler*, 61 Ind. 362; 28 Am. Rep. 675. Neither is she liable when she joins in a covenant in a deed of her husband's land: *Childs v. McChesney*, 20 Iowa, 431; 89 Am. Dec. 545. Covenants of seisin, right to convey, and against encumbrances, are merely personal covenants: *Logan v. Moulder*, 1 Ark. 313; 33 Am. Dec. 338. A wife who joins her husband in a warranty deed of his land is not estopped from asserting an after-acquired title: *Sanford v. Kane*, 133 Ill. 199; 23 Am. St. Rep. 602.

HUSBAND AND WIFE—MORTGAGES—WAIVER OF HOMESTEAD AND DOWER.—A mortgage signed and acknowledged by the wife of a mortgagor, containing apt words waiving her right of homestead and dower, is binding upon her, although her name does not appear in the granting clause: *Davis v. Jenkins*, 93 Ky. 353; 40 Am. St. Rep. 197.

CONTRACTS—TIME—LAW GOVERNING.—The laws which subsist at the time and place of making a contract enter into and form a part of it: *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186.

TURNER v. TURNER.

[107 ALABAMA, 465.]

HOMESTEAD EX VI TERMINI MEANS the family seat or mansion.

HOMESTEAD.—ACTUAL OCCUPANCY is essential to a valid claim of homestead exemption, under the code of Alabama, except in the single case of the filing of a declaration of claim to a homestead exemption in the office of the probate judge, upon leaving the homestead temporarily, or a leasing of the same.

HOMESTEAD DEPENDS UPON WHAT.—Whether a house and lot constitute a homestead depends upon the character of the building and the uses to which it is adapted, and to which it is devoted.

HOMESTEAD—DISCONNECTED HOTEL BUILDING—USE OF RENTS TO SUPPORT FAMILY.—A lot and house thereon, built and used for hotel purposes, and owned by a decedent having a complete home place across the street, in a different square of a city, and in which he resided, cannot be set apart to his widow as a part of his homestead, though rents from the hotel were used by him for the support of his family, as this use of the rents did not constitute such a connected use of the disconnected hotel property, as to impress the latter with the homestead character.

Petition by a widow for the allotment of a homestead. The application was filed, in a probate court, by Nancy Turner, the widow of L. M. Turner, deceased, to have set apart to her, as exempt from administration, a homestead in the lands of which her husband died seised. Commissioners were appointed, but their report, setting apart a hotel as a part of his homestead as exempt to the widow, was excepted to by the heirs of the deceased, and a

contest was instituted. The court sustained the contest and set aside the report of the commissioners, from which order the widow appealed.

Aiken & Burton, for the appellant.

Merrill & Bridges, for the appellees.

467 HEAD, J. The appeal is prosecuted from a decree of the probate court, setting aside the report of commissioners appointed to allot the homestead exemption to the widow of L. M. Turner, deceased. The sole question **468** presented by the record is, whether that portion of the property of the deceased husband, owned at the time of his death, upon which is located the hotel, was a part of his homestead, and, as such, exempt from administration in favor of the widow. The facts are, that the decedent resided at the time of his death upon property owned by him situated on the west side of Oxford street in the town of Edwardsville, and he had, with the exception of two brief intervals, resided there for many years prior to his death. Across the street from his dwelling, in a different square, was the lot with the hotel building thereon erected by one Hogan, which property the decedent acquired. He had, during his life, occasionally taken meals at the hotel, for which he paid as other guests, and at one time he boarded there about six months. He also stored there a few articles of furniture, but, beyond what we have stated, he had never occupied it. On the contrary, it had been rented to tenants, who conducted it as a house of public entertainment, and one Foster was in possession of it, as a tenant, when Turner died. The home place of the decedent, with its yard, stables, garden, and grass lot for pasture, seems to have been even more complete than urban homesteads usually are, and the hotel property in no way contributed to the convenience or enjoyment of the residence, unless the use of the rents therefrom in the support of his family can be so considered. According to the express provisions of sections 2507 and 2543 of the code of 1886, it is "the homestead with the improvements and appurtenances," not exceeding the statutory limit as to area and value, which is exempt from administration in favor of the widow and minor children. Additional words of description are used by section 2550, which provides for the appraisal of "the homestead of the decedent, occupied by him at the time of his death or to which he was then entitled." Construing these sections together, and with reference to section 2539, we do not doubt that actual occupancy of the property is as essential to a valid claim of homestead exemption in this state as it ever was, except in the single case of the filing of

a declaration of claim to a homestead exemption in the office of the probate judge, upon leaving the homestead temporarily, or a leasing of the same. Homestead *ex vi termini* means the family seat or mansion, and the change ⁴⁶⁹ of verbiage in our statute by the codifiers, in compiling the code of 1886, whereby they omitted from section 2507 the phrase "owned and occupied by any resident of this state" was not intended to affect the well-settled rule recognizing actual occupancy, except in the single case stated, as an essential condition of a valid homestead exemption: *Beard v. Johnson*, 87 Ala. 729; *Jeffrey v. McGough*, 88 Ala. 648. And it is to the case of temporary leaving or leasing, supplemented by the declaration filed with the probate judge as provided by section 2539, that the words "or to which he was then entitled" in section 2550 must be referred.

We do not, of course, overlook the case provided by section 2544, where the decedent, at the time of his death, had no homestead, but that section has no application here, since it clearly appears the decedent actually had and occupied a homestead, which was exempt under the law. Nor is this construction at all in conflict with *Dicus v. Hall*, 83 Ala. 159, nor with the subsequent case of *Jaffrey v. McGough*, 88 Ala. 648, recognizing it as correct, nor with the more recent case of *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241; decided upon its authority, and upon a similar state of facts. These cases hold that a disconnected tract, not contiguous to the tract upon which the dwelling is situated, but bona fide, and habitually used as a part of it, may, by such use, become impressed with the homestead character, notwithstanding its remoteness or separation from the mansion house, but "this ruling has not been extended further than to embrace two parcels, already used and appropriated to homestead purposes where they together do not exceed the statutory area and valuation": *Jaffrey v. McGough*, 88 Ala. 648. The doctrine of those cases is, not that actual occupancy may be dispensed with, in case other than that provided for by section 2539, but that the connected use of the two disconnected tracts, under the peculiar circumstances there existing, constituted occupancy by the same person as one and the same homestead. This clearly appears from the language of *Stone, C. J.*, in *Beard v. Robinson*, 87 Ala. 729, where, in speaking of the ruling in *Dicus v. Hall*, 83 Ala. 159, he says: "The only question was, whether the detached parcels of land, collectively, not in excess of the limit, could be set apart as exempt, *when they were shown to have been owned and occupied by the same person*, ⁴⁷⁰ as one and the same homestead and direct source of family support." (Italics ours.)

It is argued by appellant's counsel that the use of the rents from the hotel for the support of the decedent's family constituted such a connected use of the disconnected property as to impress the latter with the homestead character. It was expressly decided in *Kaster v. McWilliams*, 41 Ala. 302, that while the renting of land may be a source of profit which contributes to the support of the family, yet that is not the sort of use intended, the statute contemplating the use of the thing, not of its profits or of an income derived from it. That case has been repeatedly cited and its principle reaffirmed in our subsequent decisions (*Murphy v. Hunt*, 75 Ala. 438; *Lehman v. Bryan*, 67 Ala. 558; *McConaughy v. Baxter*, 55 Ala. 379), and is conclusive against the correctness of appellant's contention. Our rulings are in accord with the general run of authorities elsewhere, which it would serve no useful purpose to cite. We refer merely to the case of *Semmes v. Wheatley* (Miss., April 21, 1890), 7 S. Rep. 430, decided upon substantially the same leading facts as we find in the present record, where it was held that stores, owned by a debtor across a public road from his dwelling and rented to tenants who occupied them, formed no part of the homestead.

There is another principle equally conclusive against the appellant. As we said in *Garrett v. Jones*, 95 Ala. 96, whether a house and lot constitute a homestead "depends upon the character of the building and the uses to which it is adapted and to which it was devoted"; and we there declared, following the case of *Laughlin v. Wright*, 63 Cal. 113, and other authorities, that "the owner of an hotel, erected for and adapted to the purposes of public entertainment, would not have homestead therein though he resided there with his family." The proof shows that the building situated on what is called the hotel lot was built for a hotel and has ever since been used for such purpose. If the decedent had resided there, and had conducted the business for which it was intended, with his residence therein but a mere incident to the business, it would not have been his exempt homestead. It would be very strange indeed, if his condition and that of his widow should be more ⁴⁷¹ favorably considered, when the business was conducted by his tenants and he had a complete home place elsewhere, upon which he resided. To allow the hotel property to be set apart to the widow in this case would be to extend the law by construction merely far beyond anything which the greatest permissible liberality would justify.

The decree of the probate court, being in accord with these views, was correct, and must be affirmed.

HOMESTEAD—HOTEL BUILDING.—A homestead is a parcel of land on which the family reside, and which is to them a home: *Gallicher v. Smiley*, 28 Neb. 189; 26 Am. St. Rep. 319, and note showing that it includes the land about and contiguous to the dwelling. Actual occupancy of the premises is held, in many cases, to be essential to the creation and existence of the homestead right. Other cases hold that it is not necessary: See note to *Cameron v. Gebhard*, 34 Am. St. Rep. 838; *Cass County Bank v. Weber*, 32 Am. St. Rep. 293. A homestead must consist of one body of land, and where the claimant owns two tracts within the homestead limit, but which touch only at a common corner, he cannot claim them both as exempt, and is entitled to a homestead only in the tract on which he resides: *Linn County Bank v. Hopkins*, 47 Kan. 580; 27 Am. St. Rep. 309, and note. Two parcels of land, though not contiguous, if occupied and cultivated in connection with each other, and used as a common source of family support, may together constitute a homestead: *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241. A building constructed for use as a hotel, and primarily used for that purpose, cannot be selected and held exempt as a homestead, though the debtor and his family occupied it as their home, if his and their residence therein has been for the purpose of maintaining and conducting the business of a hotel, and for no other purpose: *McDowell v. His Creditors*, 103 Cal. 264; 42 Am. St. Rep. 114, and note showing when a whole building, partly used as a hotel, must be treated as a homestead.

BAYONNE KNIFE COMPANY v. UMBENHAUER.

[107 ALABAMA, 496.]

APPEAL—ADMISSION OF ILLEGAL EVIDENCE.—If the court, without a jury, determines the issue, the rule is, that if there are no errors in the exclusion of evidence, and the legal evidence received authorized the conclusion, although there may have been illegal evidence admitted, the conclusion reached must be sustained.

SALES—THE RIGHT OF STOPPAGE IN TRANSITU DEPENDS upon the insolvency of the vendee, either at the time of the sale of the property or subsequently and before possession, either actual or constructive, by the vendee.

SALES—STOPPAGE IN TRANSITU—ATTACHMENT—SOLVENCY OF VENDEE—EVIDENCE.—No stoppage in transitu can be asserted against a solvent debtor, and the vendor's failure to establish the insolvency of the vendee is fatal to his right of stoppage. The mere levy of an attachment, however, by creditors, before the delivery of the goods to the vendee, does not defeat the right; and where the vendor intervenes as claimant in the attachment suit, and there is a statutory trial of the right of property, evidence of the vendee's ownership of property in another state, and of its value, is admissible to establish his solvency, where the vendor and claimant is a nonresident of the state in which the attachment suit is brought.

NEW TRIAL—SURPRISE—WAIVER.—The right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A motion for a new trial, upon the ground of newly discovered evidence, should be overruled if, by reasonable diligence, the evidence could have been obtained at the time of trial.

AFFIDAVITS—SUFFICIENCY OF CERTIFICATE TO JURAT—NOTARIAL SEAL.—A certificate to the jurat of an affidavit, made out of the state, by one who attaches to his name the letters, "N. P.," is not self-proving. A notarial seal, conforming to the requirements of the statute, is indispensable.

Attachment and claim suit. Umbenhauer was the plaintiff in the attachment suit, and the Bayonne Knife Company interposed a claim to the property. There was a statutory trial of the right of property, and a judgment rendered in favor of Umbenhauer. The Bayonne Knife Company appealed.

V. L. Thompson, for the appellant.

Bowman & Harsh, for the appellee.

497 COLEMAN, J. The appellee, Umbenhauer, sued out an attachment which was levied upon certain goods as the property of S. Kaufman, the defendant in the attachment suit. The Bayonne Knife Company interposed a claim to the property, and an issue was made up under the direction of the court for the trial of the right of property. The court tried the case without the intervention of a jury and found the issue for the plaintiff. When the court, without a jury, determines the issue, the rule is, that if there are no errors in the exclusion of evidence, and the legal evidence received authorized the conclusion, although there may have been illegal evidence admitted, the conclusion reached must be sustained. The goods in question were shipped by claimant to S. Kaufman at Birmingham, Alabama, where he had been engaged in the mercantile business. At the time the goods reached Birmingham, the store of Kaufman had been closed by the sheriff, by virtue of sundry attachments issued against him. The goods in question were levied upon by plaintiff while they were in the depot of the railroad, in Birmingham, and which, after the freight charges were paid by plaintiff, were delivered to the officers making the levy by the carrier, without objection. The goods were shipped to Kaufman in the month of October, under an order given for them in March previous. There is evidence tending to show that as soon as claimant learned that the store of Kaufman had been closed by attachments, it directed the carrier to return the goods, but when this direction was given, whether before or after they had been levied upon by plaintiff's attachment, is not shown, nor has any fact been proven which tended to show when the order to return the goods was given to the carrier. The right of stoppage in transitu depends upon the insolvency of the ⁴⁹⁸ vendee, either at the time of the sale of the property or subsequently and before possession, either actual or constructive, by the vendee: *Smith v. Barker*, 102 Ala. 679; *Loeb*

v. Peters, 63 Ala. 243; 35 Am. Rep. 17; Benjamin on Sales, 6th Am. ed., sec. 1229. This principle of law seems to be almost universally recognized. In fact, we know of no authority which holds that stoppage in transitu may be asserted against a solvent debtor. The claimant objected to evidence which, if believed, established that Kaufman possessed valuable property in Georgia largely in excess of all his liabilities. The evidence tended to show that the business in Birmingham was conducted by an agent, and that Kaufman himself had not been in Birmingham for some time previous to the levy of the attachment nor since until this trial, and that he had two stores in Georgia. There is no evidence to show that credit was extended to the vendee on the faith of the business conducted at Birmingham, except the single fact of the shipment of the goods to that place. The claimants and vendors are nonresidents of the state of Alabama, and it is fairly presumable that the goods were shipped on the personal credit of the purchaser, as much so as on the faith of the business conducted in Birmingham. The court did not err in receiving evidence of the value and ownership of property in Georgia to establish his solvency. We are of opinion that the mere levy of the attachment under the facts did not defeat the right of stoppage: Loeb v. Peters, 63 Ala. 243; 35 Am. Rep. 17; Harris v. Tenney, 85 Tex. 254; 34 Am. St. Rep. 796, and notes; Benjamin on Sales, 6th Am. ed., sec. 1067. The failure to establish the insolvency of the vendee was fatal to the claim of the claimant, and the court did not err in rendering judgment for the plaintiff.

After judgment by the trial court, the claimant entered a motion for a new trial, upon the ground that he was taken by surprise by the testimony of Kaufman as to his solvency, and newly discovered evidence to the effect that Kaufman was in fact insolvent at the time of the levy of the attachment, and when the claim to the property was interposed. The insolvency of the vendee being indispensable to the exercise of the right of stoppage in transitu, the vendor intending to rely upon it must be prepared to establish this fact. The attorney for claimant makes affidavit that he was deceived ⁴⁰⁹ and misled by Kaufman himself, by statements made by him before he was examined, as to his pecuniary condition. Leaving out of consideration the denial by Kaufman of this statement, it was the duty of claimant during the trial when the surprise occurred to have made it known to the court, and that he had been deceived and misled by his witness, and moved for a mistrial or continuance of the cause. A party cannot speculate on the chances of getting a favorable verdict, and, after losing, urge as a ground for a new

trial a matter which existed during the trial, and known to movant, and which was waived: *Hoskins v. Hight*, 95 Ala. 284; *Baker v. Boon*, 100 Ala. 622.

As to newly discovered evidence, we are of opinion from the affidavit of Kaufman, which is not controverted, that an application to the Commercial Agency would have put plaintiff's attorney in possession of the facts of Kaufman's business in Georgia. The claimant itself offers no evidence to show that it was ignorant of his business in that state. All legal objections were taken to the introduction of the affidavit of an attorney residing in Georgia. The jurat is certified to by one who attaches to his name the letters N. P. A certificate of this character is not self-proving. A notarial seal, conforming to the requirements of the statute, is indispensable: *Alabama Nat. Bank v. Chattanooga etc. Co.*, 106 Ala. 663. The judge did not err in overruling the motion for a new trial upon the evidence before him.

Affirmed.

APPEAL—REVERSAL OF JUDGMENT.—The reception of incompetent evidence is not a sufficient ground for reversing the judgment, when the action was tried before the court without the aid of a jury: *Frisk v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198.

SALES—STOPPAGE IN TRANSITU—INSOLVENCY—ATTACHMENT.—The seller of goods may stop them in transit on account of the purchaser's insolvency before, but not known to the seller until after, the sale: *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17. Actual insolvency is not essential. It is sufficient if, before the stoppage, the vendee was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency, such as a general inability to pay one's just debts in the usual course of business: *Diem v. Koblitz*, 49 Ohio St. 41; 34 Am. St. Rep. 531; monographic note to *Hause v. Judson*, 29 Am. Dec. 386, on the right of stoppage in transitu, showing that the right exists only in case of the insolvency of the purchaser: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188. The attachment of goods while in transit does not impair the vendor's right of stoppage in transitu: *Harris v. Tenney*, 85 Tex. 254; 34 Am. St. Rep. 796, and note. Neither does the sale of goods under order of court pending an attachment defeat or impair the right of stoppage in transitu existing at the time of the attachment: *O'Brien v. Norris*, 16 Md. 122; 77 Am. Dec. 284. The vendor's right of stoppage in transitu is superior to the lien of an attachment or execution against the vendee levied before the delivery of the goods to him: *Farrell v. Richmond etc. R. R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted to enable one to obtain evidence, though newly discovered, which ordinary diligence could have procured on the trial: *Fears v. Albea*, 69 Tex. 437; 5 Am. St. Rep. 78; *Boot v. Brewster*, 75 Iowa, 631; 9 Am. St. Rep. 515; notes to *Brown v. Grove*, 9 Am. St. Rep. 827; *Brown v. Mitchell*, 11 Am. St. Rep. 757; *Barrett v. Dodge*, 16 R. I. 740; 27 Am. St. Rep. 777.

VANDIVER v. POLLAK.

[107 ALABAMA, 547]

JOINT LIABILITY—WRONGFUL ATTACHMENT AND SALE.—If several creditors, on the same day, sue out separate writs of attachment against a common debtor, and, without concert between them, cause such attachments to be wrongfully levied by the same officer, at the same time, upon property which they have good reason to believe has been conveyed by the debtor in fraud of their rights, and the sheriff, having been indemnified, sells such property, there is but a single trespass and cause of action, for which there can be only one recovery, or satisfaction and compensation; but the attaching creditors, in such cause of action, are jointly and severally liable.

JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—EFFECT OF.—The acceptance of the satisfaction of a judgment against one joint tort feasor, where there is but one cause of action, extinguishes the cause of action against the others.

JOINT LIABILITY.—THE DOCTRINE OF CONTRIBUTION is not founded on contract, but on the principle that equality of burden as to a common right is equity; that wherever there is a common right, the burden is also common.

DEFINITIONS — CONTRIBUTION. — **INDEMNITY** springs from contract, express or implied, and is the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. Contribution is not contractual; it is an equity founded in acknowledged principles of natural justice.

JOINT LIABILITY—CONTRIBUTION OR INDEMNITY BETWEEN JOINT TORT FEASORS.—The general principle that contribution or indemnity will not be awarded as between joint wrongdoers, is limited to intentional, meditated wrongs, and has no just application when parties are acting in good faith, in ignorance of facts rendering their conduct tortious, and such ignorance is not superinduced by their own fault or negligence.

JOINT LIABILITY—CONTRIBUTION BETWEEN JOINT TORT FEASORS—ILLUSTRATION.—If several creditors, acting separately and without concert, though simultaneously, sue out attachments and have them, at the same time and by the same officer, wrongfully levied on property which they have reasonable cause to believe has been conveyed by the common debtor in fraud of their rights; and the sheriff, upon being indemnified, sells the property, and applies the proceeds in payment of their respective demands; and the purchaser from the debtor, in an action upon the indemnity bond of one of the attaching creditors recovers damages for the wrongful taking and sale of the attached property, which damages such creditor has been compelled to satisfy, he is entitled to contribution from the other attaching creditors, who participated in the benefit resulting from the attachment and sale.

JOINT LIABILITY—EFFECT OF SATISFYING JUDGMENT AGAINST ONE JOINT TORT FEASOR.—As the satisfaction of a judgment for damages upon the indemnity bond of one of several attaching creditors, who were joint wrongdoers, inures to the benefit of all, operates as a bar to a separate suit against the others, and discharges the common liability, such satisfaction must, in a suit for contribution, be accepted as the measure of the common liability, and this may be shown by the judgment.

JOINT LIABILITY—CONTRIBUTION AMONG JOINT TORT FEASORS—PARTIES.—In a bill by a creditor for contribution against other creditors who have participated in benefits arising from wrongful attachments, and a sale of property thereunder, where he has satisfied a judgment for damages occasioned by the wrongful attachments, those creditors who levied other attachments subsequently to those under which the property was sold are not necessary parties, as these were separate and distinct trespasses for which they alone were suable and liable.

JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—TITLE TO PROPERTY. If the owner of personal property sues in trespass for the wrongful taking thereof, or in trover for its conversion, and obtains a judgment of which he has received satisfaction, the title to the property is altered, and is, by operation of law, transferred to and vested in the wrongdoer; not, however, for his exclusive benefit. He must, in equity, be regarded as holding it in trust as a security for his reimbursement of the money paid in satisfaction of the judgment, which inures to the benefit of others who have incurred, with him, a common liability.

JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—CONTRIBUTION.—If several creditors, acting separately and without concert, though simultaneously, sue out attachments against a common debtor, and cause them to be wrongfully levied, at the same time, and by the same officer, on property which is sold to satisfy their respective demands, they incur a common liability, and each is bound to contribute equally to the satisfaction of a judgment for damages, obtained by the owner of the property, upon the indemnifying bond of one of the creditors, without regard to the amount of their respective debts due from the debtor.

JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—TITLE TO PROPERTY—ACCOUNTING.—If several creditors, at the same time, but without concert, wrongfully attach the property of a common debtor, and cause it to be sold, and one of them satisfies a judgment for damages in favor of the owner of the property, he must, in seeking contribution from the others, who are also liable for such damages, use reasonable diligence in the enforcement of the title to the property, so as to render it available for the discharge of the common liability, and for any loss arising from his want of diligence, he is answerable; but he is not required to resort to suits against parties not residing in the state, or parties insolvent, or from whom satisfaction of judgment is not probable; and he will hold all recoveries, deducting the reasonable expenses attending them, for the equal benefit of himself and those from whom he seeks to exact contribution, and for which he may be compelled to account.

Bill filed by the appellee, Pollak, against the appellants, Vandiver & Co., praying for contribution from the defendants. The relief prayed for was granted, and the respondents appealed.

549 **BRICKELL, C. J.** The theory on which the bill is filed is, that the appellants and appellee bearing the relation and subject to the liabilities of joint trespassers, the appellee, having been compelled to the satisfaction of all the damages resulting from the trespass, is entitled to demand contribution from the appellants. The first question we propose to consider is, whether

that is the relation in which the parties stand. The material facts touching this question, as we collect them from the record, looking only to the evidence which is free from conflict, and to the admissibility of which there is no cause of just exception, are, that the parties respectively were creditors of the partnership of Harmon Brothers, who, ceasing to do business, made a sale to their father of all their property and assets. On inquiry by the common attorney of the parties into the facts and circumstances attending the sale, they were advised that it was fraudulent as to creditors, affording legal cause for the issue of attachments to enforce payment of their debts. Acting on this advice, the parties sued out attachments, and separately indemnified the sheriff to levy upon and make sale of a stock of merchandise, the only visible, tangible property, the subject of the sale to the father. The attachments were issued on the same day, ⁵⁵⁰ and under the levies there was a sale, from the proceeds of which the parties received satisfaction of their demands. The father, the purchaser of the merchandise from the debtors, instituted several actions against the sheriff and his indemnitors to recover damages for the taking and sale of the merchandise, which, as to the sheriff abated, we suppose, because of his death pending the suits. The suit against the appellee and the surety on the indemnifying bond he had given the sheriff resulted in a judgment against them for the sum of five thousand five hundred and thirty-four dollars and seventy-four cents damages, and the further sum of two hundred and sixty-eight dollars and seventy cents costs. An appeal was taken to this court, and there was an affirmance of the judgment. The judgment was satisfied by the appellee, but it is not clearly shown the precise amount paid in satisfaction, and, after its satisfaction, the suit against the appellants was dismissed at their costs.

The wrong which formed the gravamen of the action against the sheriff and his indemnitors consisted in the taking of the merchandise and its sale under the attachments. The wrong was the physical act of the sheriff, a continuing trespass having its incipency in the seizure of the merchandise and terminating in the sale. There was but one trespass—but one seizure and sale of the merchandise—from which accrued to the true owner, a single, indivisible cause of action: *O'Neal v. Brown*, 21 Ala. 482. 'This single cause of action, though entitled to but one compensation or satisfaction, he had the election to pursue jointly or severally against all who aided in, or who advised or procured, or accepted benefits resulting from, the trespass. If it is conceded that there was no concert between the appellants and the appel-

lee in the issue and levy of the attachments, that each was pursuing a legal remedy separately and independently of the other, yet, in the single trespass which was committed, and which was the immediate act of the sheriff, their common agent, each participated to the same extent, and each accepted benefits resulting from the trespass. In *Sparkman v. Swift*, 81 Ala. 233, it is said: "If several creditors sue out at different times separate writs of attachment against a common debtor, and cause them to be simultaneously levied by the same officer, they will be regarded, the levy being wrongful, as joint wrongdoers, though they may have acted separately, ⁵⁵¹ without concert, and each was endeavoring to secure a priority of lien. The wrong, in such case, consists in the levy and seizure of the property, which was done by the same officer, at the same time, for each and all of the attaching creditors. They contemporaneously committed the wrong by a common agent." The case of *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, was referred to approvingly, in which, on reasoning that seems conclusive, it was held that where different creditors, acting separately and without concert, caused a common debtor to be arrested at the same time by the same officer, on their several writs, they were joint trespassers, the arrest being unlawful, and they were jointly liable. It was said by the court, as may now be said properly, "it was the common case of a wrongful and unlawful act, committed by a common agent acting for several and distinct principals."

Though there were separate suits against the appellee and the appellants, as we have said, there was but one tort, for which the party aggrieved was entitled to but one satisfaction or compensation. It is merely elementary to say that there can be against the same person but one recovery for the same cause of action: *O'Neal v. Brown*, 21 Ala. 482. And so there can be for the same cause of action but one satisfaction obtained from several persons for a single injury, in itself and of itself an indivisible cause of action. The acceptance by the true owner of the merchandise of the satisfaction of the judgment against the appellee extinguished the single cause of action on which the judgment was founded, and on which the suit against the appellee was founded, forming a bar to the further prosecution of that suit, except as to the costs: 2 Freeman on Judgments, sec. 467; *Blann v. Crocheron*, 19 Ala. 647; 54 Am. Dec. 203; 20 Ala. 320; *Smith v. Gayle*, 58 Ala. 600; *Du Bose v. Marx*, 52 Ala. 506. Whether the satisfaction was by the appellants pleaded in bar of the further prosecution of the suit is not shown, nor is it material. The judgment rendered is the equivalent of that which must have been rendered

if such plea had been interposed; and from it all the benefit incurred to the appellants which would have resulted from a formal plea and judgment thereon rendered.

The next question is, Are the appellants bound to contribute to reimburse the appellee for the moneys expended ⁵⁵² in the satisfaction of the judgment? The cause was before the court at a former term, on an appeal from a decree of the court of chancery, overruling demurrers directed to the equity of the bill. After elaborate argument, it was then decided that as it was apparent from the allegations of the bill the parties were jointly and severally liable for the taking and sale of the merchandise, and the taking and sale was not an intentional, meditated wrong, the appellee having been compelled to the satisfaction of the resulting damages, the appellants were under the duty of contributing to his reimbursement: *Vandiver v. Pollak*, 97 Ala. 467.

The doctrine of contribution is not founded on contract, but on the principle that equality of burden as to a common right is equity—that wherever there is a common right the burden is also common. In *Campbell v. Mesier*, 4 Johns. Ch. 338, 8 Am. Dec. 570, it was described or defined by Chancellor Kent: “The doctrine rests on the principle that where the parties stand in equali jure, the law requires equality which is equity, and one of them shall not be obliged to bear the burden for the ease of the rest.” The cases are numerous, the subject matter and the relations of the parties varied, in which the doctrine has been applied; they are founded upon and illustrative of the maxim, “*Qui sentit commodum sentire debet et onus*—he who derives the advantage ought to bear the burden”: *Broom’s Legal Maxims*, 706. There was some common obligation, or duty, or liability, which ought to be apportioned, or which, resting upon the one party primarily, ought to be borne by him to the exclusion of the others, which had fallen upon the one party solely, or in undue proportion.

For the taking and sale of the merchandise, the parties participating, and all in legal contemplation participated, who may have given physical aid, or advised or procured the acts to be done, or may have subsequently assented to and received benefit from them, incurred a joint and common liability. The party wronged had the election to sue them jointly or severally, but the election wrought no change in the nature of the acts, or in the relation of the wrongdoers. The equity of the demand of the appellee for contribution appeals to the sense of justice. Upon him has fallen the entire burden of a joint liability, which in good conscience ought to have ⁵⁵³ fallen upon him and the appellants

in common, and unless it can be said he does not come into court with clean hands, he is entitled to relief. The insistence is, that he does not come into court with clean hands, that he is a tortfeasor, as were the appellants tortfeasors in their participation in the taking and sale of the merchandise, and, as between them, the court will not intervene for the relief of the one or the other.

As a general principle of the common law, it is often stated that indemnity or contribution will not be enforced as between joint wrongdoers. The reason underlying the principle is, that courts will not lend assistance to him who founds his cause of action on an immoral or illegal act—*ex turpi causa, oritur non actio*. A trespasser confessing that he has injured or taken the property of another is not entitled to the assistance of courts instituted as well for the protection of property as for the protection of persons to recover indemnity or contribution from his associates in the trespass. The principle has its limitations and exceptions, and must be applied according to its true sense and meaning. A well-recognized limitation or exception, observed by the most approved text-writers, and declared in well-considered judicial decisions, some of which were referred to when this case was formerly before the court, is, that if there is not a known, meditated wrong—if the parties act bona fide, under the supposition of the entire innocence and propriety of the act—there is not room or reason for the application of the principle: Story on Agency, sec. 339; Story on Partnership, sec. 220; Cooley on Torts, 147; Pollock on Torts, 171; Bishop on Contracts, sec. 216; 4 Am. & Eng. Ency. of Law, 12. And this limitation or exception prevails, whether it is indemnity or contribution which is sought; there can be no distinction drawn between the one and the other. Indemnity springs from contract express or implied, and, in a general way, may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. Contribution, it is true, is not contractual; it is an equity founded in acknowledged principles of natural justice. Whenever indemnity is free from the taint of illegality, in the absence of contract, under a corresponding state of facts, the equity of contribution may arise—the taint of illegality cannot be imputed.

554 The general principle of the common law, and its limitation or exception, is thus expressed by Judge Story: "It may be stated as a general principle of law that an agent who commits a trespass or other wrong to the property of a third person by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts bona fide,

will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby. For although the general doctrine of the common law is, that there can be no reimbursement or contribution among wrongdoers, whether they are principals or are agents, yet that doctrine is to be received with the qualification that the parties know at the time that it is a wrong. And in all these cases there is no difference, whether there be a promise of indemnity or not; for the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently, and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him": Story on Agency, sec. 339. In *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376, Spencer, C. J., said: "I have no hesitation in saying it is a true and just distinction between promises of indemnity which are, and those which are not, void; that if the act directed or agreed to be done is known at the time to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise." In *Ives v. Jones*, 3 Ired. 538, 40 Am. Dec. 421, it was said by Ruffin, C. J.: "If it were not so, no one could ever expect assistance in enforcing his rights by means, even the most peaceable, which would subject the parties to an action sounding in tort, and an end would be put to indemnities. For, if the right be with the parties indemnifying, there is no need of the indemnity; and if it turn out to be in another, who recovers for the injury, the rule would make the indemnity void. But when the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known to the person employed to be wrongful to a third person, there can be no objection to giving effect to a contract to save harmless one who, from good motives, did an act for his employer, which, ⁵⁵⁵ contrary to his expectation, happened to be an injury to a third person. That is not like the perpetration of an act, manifestly unlawful and criminal, seeking redress against the procurer. Indemnities for acts apparently right or not apparently wrong have always been upheld." In our own case of *Moore v. Appleton*, 26 Ala. 633, it was ruled that where an agent is employed by a principal to do an act which is not manifestly illegal, and which he does not know to be wrong (as to take personal property, which, although claimed adversely by another, he has reasonable grounds to believe belongs to the principal), the law implies a promise of indemnity by the principal for such losses and damages as flow directly and immediately

from the execution of the agency; and it was said the promise is implied upon the plain dictates of reason and natural justice.

The principle and its distinction was stated with much of care and precision by Bigelow, J., in *Jacobs v. Pollard*, 10 Cush. 287, 57 Am. Dec. 105: "No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom, or by whose authority, such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike requires that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know, that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a willful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases."

In the case of *Farwell v. Becker*, 129 Ill. 261, 16 Am. St. Rep. 267, the parties were in the identical relation of the appellants and the appellee, under a similar state of facts. After an elaborate examination of the authorities, the court said: "Under the authorities, we think it is clear that if the attaching creditors, at the time they sued out their attachments and seized the goods, acted ⁵⁵⁶ in good faith, exercising such prudence and caution as an ordinarily prudent person would exercise, with no intention of committing a trespass or injuring anyone, but with the honest belief that the transfers made by Olquist Brothers were fraudulent as to creditors, the right of contribution exists, although it ultimately turned out that the seizure of the goods was unlawful and unwarranted." In *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663, a similar case, the court said: "The rule that no contribution lies between trespassers is one not of universal application. We suppose it only applies to cases where persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them."

Without pursuing further our examination of the authorities, we are of opinion they maintain that the general principle that contribution or indemnity will not be awarded as between joint wrongdoers is limited (to state the limitation most narrowly) to

intentional, meditated wrongs, and has no just application when parties are acting in good faith, in ignorance of facts rendering their conduct tortious, and such ignorance is not superinduced by their own fault or negligence.

The sale to the father was recent and unusual, of course attracting the attention and exciting the inquiries of the creditors of the vendors. With care and caution, before the issue of the attachments, the appellants and the appellee instituted inquiries into the facts and circumstances attending it. An attorney was retained to conduct the inquiries, who visited the locality of the sale, of the residence of the vendors, in which they had been engaged in business. Facts came to his knowledge which were indicative that the sale was fraudulent, and would have created in the mind of the most prudent the reasonable belief that such was its real character. These facts he communicated to his clients, accompanied by the advice that attachments could rightfully issue, and that the merchandise was subject to their levy; and it was upon these facts and this advice the parties proceeded. Meditated, intentional wrong is excluded—the ⁵⁵⁷ parties believed, and the belief was reasonable and bona fide, that they were in the rightful pursuit of legal remedies to enforce payment of their just demands. The event proved only that they were mistaken, and mistaken without fault or negligence on their part. The rule of the common law, of very general application, is, that there can be no crime when the criminal mind or intent is wanting. When that is dependent on a knowledge of particular facts, ignorance or mistake as to those facts honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility. It is forcibly said by Mr. Bishop: "The doctrine seems to be, that to take away the equitable right of enforcing contribution there must be an evil intent, similar to the element of intent in the criminal law, where an ignorance of a sort to free one from culpability will excuse what otherwise would be punishable. But the wrongful act need not be a crime"; and such he states to be the philosophy of the doctrine: Bishop on Contracts, sec. 216, note 1. We repeat, of all evil intent, of all meditated or intentional wrong, the parties are acquitted. If the facts had existed, as they reasonably believed them to exist, there would have been no wrong. The remedies they pursued were the only legal remedies which could be pursued to reach and subject the merchandise, and they were the remedies ordinarily pursued by creditors under like conditions and circumstances. The possession of the merchandise by the father, and that the seizure of the merchandise was a disturbance

of the possession, is of but little, if any, importance. If the sale was fraudulent, as the parties really believed, the possession under it was fraudulent, and the merchandise was as subject to the levy of the attachments as if it had remained in the possession of the vendors. Attachment was not only the remedy ordinarily pursued by creditors under like conditions and circumstances, but it was not of more embarrassment to the purchaser in the assertion of his title, than any other efficient remedy to which the creditors could have resorted. The merchandise was not of peculiar value; if the seizure and sale was wrongful, the loss and damage were capable of full compensation by the ordinary remedies of the law, and by a resort to these remedies full compensation was obtained. We conclude, the ⁵⁵⁸ equities of the case are with the appellee, and the appellants are under duty of contribution.

The extent to which the judgment against the appellee is to be received in evidence seems to be a matter of controversy. The general principle is, that judgments are admissible and conclusive as evidence only against parties or privies. But the principle is also established, that as against all the world, a judgment is evidence of the fact of its own rendition and of all the resulting legal consequences: 2 Freeman on Judgments, sec. 416; 1 Greenleaf on Evidence, sec. 438. The present judgment was evidence not only of the fact of its own rendition, but it was evidence, as matter of inducement to the evidence, that the cause of action on which it was founded was the taking and sale of the merchandise, and of the damages adjudged against the appellee for the tort: *Preslar v. Stallworth*, 37 Ala. 402; 2 Freeman on Judgments, sec. 417; 1 Greenleaf on Evidence, sec. 539. It may not be evidence that the tort was the cause of action forming the gravamen of the separate action against the appellants, and of the relation of the parties as joint tort feasons, but these are facts clearly shown by extrinsic evidence. It was the satisfaction of the judgment which was available to the appellants, inuring to their benefit, operating a bar to the further prosecution of the separate suit against them, and discharging the common liability. It is, therefore, now to be accepted as the measure of the common liability.

The creditors who subsequently issued and caused to be levied attachments on the merchandise were not joint trespassers with the appellants and the appellee, and were not jointly liable with them. The trespasses they committed were separate and distinct trespasses, for which they alone were suable and liable. They were not, in any aspect of the case, necessary parties to the bill: *Sparkman v. Swift*, 81 Ala. 231.

The doctrine in this state is settled, that if the owner of per-

sonal property sue in trespass for the wrongful taking, or in trover for its conversion, and obtain judgment of which he received satisfaction, the title to the property is altered; it is by operation of law transferred to and vested in the wrongdoer: *White v. Martin*, 1 Port. 215; 26 Am. Dec. 365; *Spivey v. Morris*, 18 Ala. 254; 52 Am. Dec. 224; *Griel v. Pollak*, 105 Ala. 249. The satisfaction of the judgment against him by the appellee converted him into the ⁵⁵⁹ owner of the merchandise, by relation, from the day of its seizure by the sheriff. The subsequent attaching creditors receiving moneys from the sheriff, derived from the sale of the merchandise, became liable to the appellee as the owner; it was his property which was converted, and to him, ex equo et bono, the moneys belonged: *Griel v. Pollak*, 105 Ala. 249.

The remaining question is as to the extent of the right of the appellee to contribution. As has been said, the judgment against the appellee, as affirmed in this court, is the measure of the common liability. It was of that judgment that the true owner of the merchandise accepted satisfaction, extinguishing the common liability, forming a bar to the further prosecution of the separate suit against the appellants. The legal operation of the satisfaction of the judgment was to vest in the appellee the title to the merchandise, but the title did not vest in him for his exclusive benefit, and it could not be employed for his own uses only. In equity, he must be regarded as holding it in trust, as a security for his reimbursement of the money paid in satisfaction of the judgment. The duty rested upon him so to use the title, like the duty resting upon the appellants to contribute to his reimbursement, is an equity springing from their relation as bearers of a common burden. Whenever such relation exists, if there be not in the circumstances of the particular case something rendering it inequitable, if the party seeking contribution has security or means of indemnity, derived from the transaction in which the common liability has its origin, it is a moral and legal duty to appropriate them to the discharge of that liability. This is a settled principle of courts of equity in relation to cosureties. If one of them take from the principal a security or indemnity, it inures to the benefit of all, and he will be compelled so to appropriate it: *White v. Banks*, 21 Ala. 705; 56 Am. Dec. 283; *Steele v. Meal-ing*, 24 Ala. 285; *Hartwell v. Whitman*, 36 Ala. 712; 1 Lead. Cas. Eq., pt. 1, 171; *Hall v. Cushman*, 43 Am. Dec. 562, note. Standing in the relation of a quasi trustee, the appellee was under the duty of reasonable diligence in the enforcement of the title to the merchandise, so as to render it available for the discharge of the common liability, and for any loss arising from his want of dili-

gence he is answerable: 1 Lead. Cas. Eq., pt. 1, ⁵⁶⁰ 173; Steele v. Mealing, 24 Ala. 285. All moneys recovered by him from the subsequent attaching creditors, deducting the reasonable expenses of the recovery, should be applied to the discharge of the common liability. And if there has been any loss resulting from his neglect to pursue legal remedies for the recovery of moneys paid to such creditors, for the resulting damage he is answerable. To avoid misapprehension, or misconstruction on this point, we deem it proper to say reasonable diligence does not require that the appellee should have resorted to suits against parties not residing in the state, or parties insolvent, or from whom satisfaction of judgment was not probable.

Without a reference to the register, the chancellor ascertained the principal and interest of the judgment rendered against the appellee in the circuit court, and decreed that the appellants pay the appellee one-half of the aggregate. The judgment of this court was the measure of the common liability, but the error of the chancellor in this respect was not of injury to the appellants, and will not avail to reverse. But there was error of injury to the appellants. There should have been a reference to the register to ascertain and report what sums the appellee had recovered from subsequent attaching creditors, and when the amount of the recovery or recoveries were paid to appellee, and what was the reasonable expenses attending such recovery or recoveries; and also to ascertain and report whether, by the use of reasonable diligence, the appellee could have realized other sums from other of the subsequent attaching creditors. In the present condition of the record, there should also have been a reference to ascertain the precise amount the appellee paid, in satisfaction of the judgment of this court. Without the reference suggested, the equities of the parties cannot be properly adjusted.

The decree must be reversed and the cause remanded for further proceedings in accordance with this opinion.

PER CURIAM. The applications for a rehearing have been considered. As to the application of the appellant, it is not necessary to say more than that we adhere to the conclusions announced in our former opinion, that the parties having incurred a common liability, ⁵⁶¹ each was bound to contribute equally to its satisfaction, without regard to the amount of their respective debts against Harmon Brothers. But we are of opinion the application of the appellee must be granted, the judgment of reversal heretofore rendered set aside, and a judgment of affirmance rendered. The reason for the reversal was, that the chan-

cellor should have directed "a reference to the register to ascertain and report what sums the appellee had recovered from the subsequent attaching creditors, and when the amount of the recovery or recoveries were paid to the appellee, and what was the reasonable expenses attending such recovery or recoveries; and also to ascertain and report whether, by the use of reasonable diligence, the appellee could have realized other sums from other of the subsequent attaching creditors." The evidence, and the only evidence in the record, from which we were of opinion the duty of ordering the reference resulted was an admission of counsel that the appellee had recovered two judgments, against solvent parties, recovering moneys the parties had received from the sale of the goods, under attachments, subsequent to the attachments of the appellee and the appellants, from which judgments an appeal had been taken to this court. We are not now of opinion this evidence necessitated a reference to the register. There was no disputed fact of which the register could have taken evidence; we mean that at the time of the decree there was not such fact. If the appellee had realized the recoveries, the reference would have been proper and necessary. But the cause could not be suspended to await the happening of events which might enlarge or diminish the liability of the appellants. Whether appellee realized these recoveries, or may realize other recoveries, he holds and will hold them, deducting the reasonable expenses attending them, for the equal benefit of himself and the appellants; and the appellants have clear legal remedies to compel the defendant to account for them.

Let the decree of the chancellor be affirmed.

JOINT LIABILITY—TORT FEASORS—SATISFACTION OF JUDGMENT.—If two or more persons jointly commit an actionable tort, the injured party may join them in one action, or he may have a separate action against each, though he can have but one satisfaction: *State v. Boyce*, 72 Md. 140; 20 Am. St. Rep. 458; *Wisconsin Cent. R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49. Satisfaction by one of several parties originally liable for a debt or wrong discharges all the others: *Mathews v. Lawrence*, 1 Denio, 212; 43 Am. Dec. 665. One of several wrongdoers is liable to the full amount of a conversion or misappropriation in which he has participated: *Russell v. McCall*, 141 N. Y. 437; 38 Am. St. Rep. 807.

JOINT LIABILITY—TORT FEASORS—CONTRIBUTION.—If there has been a recovery against one of several joint tort feasors, and satisfaction thereof by the defendant, and the act for which recovery has been had was not ordinarily or necessarily unlawful, and the person seeking contribution or indemnity did not in fact intend any wrong, and the act and the circumstances are not such that he must be presumed to have intended a wrong, then he may enforce contribution against the others: *Note to Carterville v. Cook*, 16 Am. St. Rep. 254.

THE DOCTRINE OF CONTRIBUTION is not so much founded on contract as on the principle of equity and justice that where the interest is common, the burden also should be common; and this principle that equality of right requires equality of burden, has a more effectual operation in a court of equity than in a court of law: *Campbell v. Mesier*, 4 Johns. Ch. 335; 8 Am. Dec. 570. As the right of contribution results from natural equity, it cannot be enforced where the equity upon which the right is based is rebutted: *Taylor v. Morrison*, 26 Ala. 728; 62 Am. Dec. 747.

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[107 ALABAMA, 710.]

CHATTEL MORTGAGE ON UNPLANTED CROP—NATURE AND EFFECT OF.—A mortgage on an unplanted crop does not pass to the mortgagee a legal title to the crop as it may be planted, or as it may come into existence; but, in a court of equity, it operates by way of present contract, taking effect and attaching to the crop when, and as soon as, it comes in esse, creating a right the court will enforce against all others than bona fide purchasers for value.

CHATTEL MORTGAGE—UNPLANTED CROP—RIGHT OF TRIAL TO PROPERTY.—A mortgagee of an unplanted crop may as soon as the crop comes into existence, and under a statute providing that "the right of trial to property shall include any person who holds a lien upon, or equitable title to, such property," try his right to it at law, as though he had the legal title.

CHATTEL MORTGAGE—UNPLANTED CROP—EQUITABLE OWNERSHIP.—As soon as an unplanted crop, or other thing mortgaged, comes into existence, the vendor, or his assignee with notice, becomes a trustee holding the legal title for the benefit of the mortgagee, and whenever this equitable ownership or interest exists, the courts will interfere for its protection.

CHATTEL MORTGAGE—UNPLANTED CROP—WHEN LEGAL TITLE IS COMPLETE.—When the property covered by a mortgage on an unplanted crop comes into existence and is delivered to the mortgagee, his legal title to it becomes complete, and he may maintain trespass, trover, or detinue against anyone who disturbs his possession; or if, before it is delivered to him, the mortgagor or his assignee, with knowledge of the mortgage lien, receives and disposes of it, either or both are liable in case to the mortgagee for the value of the property disposed of.

CHATTEL MORTGAGE ON UNPLANTED CROP, PRIORITY OF LIEN—RIGHTS OF UNSECURED CREDITORS—INSOLVENT ESTATE.—If a person mortgages to a bank the crops to be grown on his land during a certain year, for a large amount, and transfers to the bank, by such mortgage, all his claims for rents and advances during that year, and his widow, as administratrix, after her husband's death during such year, collects the rent and advances, and pays the amount thereof to the bank, on its mortgage lien, unsecured creditors have no right to the proceeds of the crops under lien for such rents and advances, until the bank's prior right is satisfied; and, if the amount collected and paid over is not sufficient to discharge the mortgage debt, they are, of course, not injured. The fact that the estate is insolvent, and that advances made by the mortgag-

or to his tenants were purchased by him from a merchant, who advanced them on the mortgagor's credit, does not give the creditors any right to such proceeds.

EXECUTORS AND ADMINISTRATORS—PAYMENTS FOR THEIR OWN BENEFIT—CREDITS.—After all the personal property covered by an intestate's mortgage, except a portion thereof which has been set apart to the widow as exempt, has been exhausted in discharge of the mortgage debt, leaving a small balance due, and the widow, as administratrix, afterward pays off this balance for her own benefit, to relieve her exempt property from the mortgage lien, there being no other personal property, she is not entitled to be credited with this payment in the settlement of her account as administratrix.

EXECUTORS AND ADMINISTRATORS—DISCHARGE OF ENCUMBRANCES—CREDITS.—When it will promote the interest of an insolvent estate, an administratrix has authority to discharge encumbrances upon the property of the estate. Hence, if there are unencumbered mortgages on land, upon which payments, though small as compared with the value of the land mortgaged, must be made, or the mortgages become liable to foreclosure, and the mortgage debts are scarcely more than half the value of the land, the administratrix, after failing twice to get a bidder upon exposing the land to public sale, owing to the times and circumstances being unpropitious for a sale, may properly rent the land and apply the proceeds received to the relief of the land mortgaged, though a part of it has been set apart to her as exempt, and she should, in the settlement of her accounts, be allowed credit for such application of the rent.

EXECUTORS AND ADMINISTRATORS—IMPROPER CHARGES AGAINST ESTATE.—Debts contracted by the widow in her own name for family supplies, after the date of the death of her husband and her own appointment as his administratrix, are not proper charges against his estate in her favor on the settlement of his insolvent estate by her.

EXECUTORS AND ADMINISTRATORS—COSTS AS A CHARGE AGAINST ESTATE.—The administratrix of an insolvent estate is not entitled to credit for costs paid by her in a case against a debtor, and compromised by her, without an order of the court. Such costs are not a preferred claim against the estate.

EXECUTORS AND ADMINISTRATORS—POWER TO RENT—LIABILITY.—Under the statute of Alabama, an executor or administrator may rent the lands of the estate without demanding security for the rent; and, if he acts judiciously in making rents, and for the best interests of the estate, he is not chargeable with what he fails to collect.

Proceedings upon the settlement of Sarah A. Ballard, as administratrix of the estate of J. C. Ballard, deceased, after it had been declared insolvent. Ballard died in August, 1891, and left surviving him a widow and minor children. Letters of administration upon the estate were granted to his widow, Sarah A. Ballard, on September 22, 1891. The estate was, on April 8, 1895, declared insolvent, and, on May 13, 1895, the administratrix was ordered to make a settlement. She filed her account and vouchers, asking credit for the sums of \$439.14, \$450.43, and \$739.65, paid to the Farmers and Merchants' Bank. The Patapsco Guano Company and J. B. Collier, creditors of the estate, objected to

these items of credit, upon the ground that they were not preferred claims, the estate being insolvent. A mortgage to the bank for the sum of \$1,665.50, given by Ballard in 1890, was then introduced in evidence by the administratrix. This mortgage, after conveying to the bank the crop of 1891 and other personal property to secure the debt to the bank, also transferred to the bank all of Ballard's claims for rent and advances during 1891. The mortgage contained a power of sale, with a right of seizure. It was proved that Ballard rented land and made advances to various parties in 1891, and that the advances so made amounted to about \$1,000. Certain mules and a wagon, covered by the mortgage, were set apart to the widow as exempt, and appraised at \$315.72. Evidence was then offered by the administratrix that the payments objected to were made to the bank out of the proceeds of rent and advances due Ballard in 1891, which advances were made after the execution of the mortgage, except the sum of \$59, which amount was paid out of the general assets of the estate, the receipts for rent and advances not being sufficient to make payment of that sum to the bank. Advances were made through one F. C. Bass, a merchant, to the extent of about \$250. They were charged to Ballard on Bass' books. The rent for 1891 was collected. The objection of the creditors did not apply to the rents transferred by the mortgage, but only to the advances of about \$1,000. The court allowed the administratrix credit for all these amounts, except the \$59, which was denied, and both the creditors of the estate and the administratrix excepted. In her account, she asked for a credit of \$108, for each of the years from 1891-1894, both inclusive, paid partly as interest and partly as principal of debts owed by the estate. The creditors objected to these items being allowed as credits because they were not preferred claims against the insolvent estate. The administratrix then offered in evidence the two mortgages mentioned in the opinion, one for \$1,700, and the other for \$170. The widow's exemption of 120 acres of the land mortgaged had been set apart to her before any payments were made on the mortgages. The mortgages last mentioned did not cover any crops to be grown on the land at any time, or rents arising from the land, and the mortgagee, as such, never claimed the same. The court denied the administratrix a credit for any amount paid on the debt for 1891, as all the crops and rents for that year were mortgaged to the Farmers and Merchants' Bank, but it did allow her a credit of \$68.60 for each of the years 1892, 1893, and 1894. The objecting creditors and the administratrix both appealed. The creditors assigned the following errors: 1. The allowance of credit

for payments made to the Farmers and Merchants' Bank, except the \$59; 2. The allowance of credit to the administratrix of any amount paid as interest on the mortgage debt of \$1,700 and principal of \$170. The administratrix assigned as error: 1. The refusal of the court to allow the full amount paid to the Farmers and Merchants' Bank, and not allowing her the credit of \$59 paid to that bank; 2. The court's failure to allow the administratrix a credit of \$108 for each of the years 1891, 1892, 1893, and 1894, for payments made on the interest of the debt of \$1,700, and principal of the mortgage debt of \$170.

Worthy & Foster and Brannon & Samford, for the creditors.

M. N. Carlisle, for the administratrix.

715 HARALSON, J. 1. It is provided by statute that "the claim of the landlord for rent and advances, or for either, may be by him assigned, and the assignee shall be invested with all the landlord's rights, and entitled to all his remedies for their enforcement": Code, sec. 3059. And, in the statute for the trial of the right of property, the provision is found that "this right of trial to property shall include any person who holds a lien upon, or equitable title to, such property": Code, sec. 3004.

716 By former decisions of this court it was settled that a mortgage on an unplanted crop does not pass to the mortgagee a legal title to the crop as it may be planted, or as it may come into existence; but that in a court of equity it operates by way of present contract, taking effect and attaching to the crop when and as soon as it comes in esse, creating a right the court will enforce against all others than bona fide purchasers for value: *Abraham v. Carter*, 53 Ala. 8; *Booker v. Jones*, 55 Ala. 266; *Rees v. Coats*, 65 Ala. 256; *Columbus Iron Works v. Renfro*, 71 Ala. 577. And it was also held that such a mortgagee, not having the legal title, could not maintain a trial of the right of property, if, when the crop came into existence, a creditor of the mortgagor should seize it on legal process; that his remedy for the recovery of the things in specie was in equity exclusively: *Stern v. Simpson*, 62 Ala. 194; *Columbus Iron Works v. Renfro*, 71 Ala. 577. But this latter doctrine has been changed by the code in the section last referred to, and one having a lien upon or equitable title to the property may now claim and try his right to it at law, as though he had the legal title: *Hardy v. Ingram*, 84 Ala. 544; *Ballard v. Mayfield*, 107 Ala. 396.

In *Abraham v. Carter*, 53 Ala. 8, it was said: "A thing not having an existence actual or potential, but the future acquisition

of which is contemplated, if not capable of assignment or sale, is the subject of a valid agreement to assign or sell. . . . So a mortgage of the hire or use of slaves the mortgagor may hire the next year to make a crop with, and the entire crop he may make the present and next year, though it is only contemplated the slaves may be hired and the crops planted, has been deemed valid, the lien attaching when the slaves were hired, or the crops grew, binding them from that time: *Floyd v. Morrow*, 26 Ala. 353; *Butt v. Ellett*, 19 Wall. 544; *Sillers v. Lester*, 48 Miss. 513. . . . In a court of equity, assignment not only of choses in action, but of contingent interests and expectancies, and also of things which have no present, actual, or potential existence, but rest on mere possibility only, are supported. The assignment operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse: *Mitchell v. Winslow*, ⁷¹⁷ 2 Story, 639"; *Booker v. Jones*, 55 Ala. 266. So soon as the crop or other thing mortgaged exists, the vendor or his assignee with notice, becomes a trustee holding the legal title for the benefit of the mortgagee. And whenever this equitable ownership or interest exists, the courts will interfere for its protection: *Mayer v. Taylor*, 69 Ala. 406. If the property in such a mortgage when it comes into existence is delivered to the mortgagee, his legal title to it becomes complete, and he may maintain trespass, trover, or detinue against any one who should disturb his possession; or, if before it is delivered to him, the mortgagor or his assignee, with knowledge of the mortgage lien, should receive and dispose of it, either or both would be liable in case to the mortgagee for the value of the property disposed of: *Hurst v. Bell*, 72 Ala. 340; *Hussey v. Peebles*, 53 Ala. 432; *Abraham v. Carter*, 53 Ala. 8.

J. C. Ballard on November 15, 1890, mortgaged to the Farmers and Merchants' Bank, the crops to be grown on his lands in the year 1891, and transferred to said bank, by said mortgage, all his claims for rent and advances during the year 1891. Said mortgage was given, also, on certain mules and wagon, and was to secure a debts of about \$1,700. Said Ballard died, afterward, in August, 1891, and his widow, Sarah A., was appointed as his administratrix. She collected these rents and advances, and paid them over to said bank on its mortgage lien on them. In making these payments, she did what was right and legal to be done, and what the bank could have enforced by appropriate action, whether the estate of Ballard was solvent or insolvent. The creditors had no right or claim to the proceeds

of the crops under lien for these rents and advances, until the bank's prior right to them was satisfied; and as the amount collected and paid over was not sufficient to discharge the mortgage debt, they were not injured: *McNeill v. McNeill*, 36 Ala. 110; 76 Am. Dec. 320; *Loeb v. Richardson*, 74 Ala. 312.

The fact that Ballard was not a merchant, but a farmer, and purchased the advances he made to his tenants from one Bass, by getting Bass to advance them on his credit, did not in any way interfere with the acquisition by Ballard of a lien on the crops for the advances thus made. It was he who owned and made the advances ⁷¹⁸ and not Bass. The latter had and claimed no lien on the crops for the goods he sold Ballard.

2. The evidence showed that after all the property included in said mortgage, except the mules and wagon, was exhausted in discharge of said mortgage debt to the bank, there remained due and owing as a balance thereon the sum of \$59, and this sum the administratrix paid in full satisfaction of the mortgage, and that the mules and wagon had been appraised at \$315, and set apart to her as exempt, by commissioners appointed by the probate court, before any amounts had been paid by her, as administratrix, on said mortgage. There is no proof that there was any other personal property belonging to the estate. The court disallowed this credit to the administratrix, and in this there was no error. She paid this sum for her own benefit, to relieve property, which had been valued and set apart to her as exempt from encumbrance, and, besides, the presumption might be indulged to sustain the ruling of the court that the commissioners, in valuing the property, had reference to the encumbrance on it.

3. The proof tended to show that said Ballard, in his lifetime—on November 1, 1890—executed two mortgages on 320 acres of land, to secure two debts, one for \$1,700, due the 1st of November, 1894, and provided for the payment of the interest of the debt, annually, on the first days of November of each year, and the second, for a debt of \$170, to be paid in equal annual installments, on the first days of November, 1891, and ending with the 1st of November, 1894. Each of said mortgages contained the provision that, in case of the failure to make either of said annual payments, as in each provided, the whole debt should become due and payable, and the mortgage should be subject to foreclosure under its power of sale, at the election of the mortgagee. It was also shown that about the last of the year 1891, the administratrix obtained an order of the court for the sale of the lands belonging to the estate to pay debts, and in the earlier part of 1892,

and again in the winter of that year, had offered the same for sale and could not get a bidder; that on November 1, 1891, said land was worth about \$10 per acre; that since that time, land had declined in value in that neighborhood, and in ⁷¹⁹ consequence of that fact, and that the homestead consisted, in part, of 120 acres of the land in the mortgage, she could not get a bidder for the land which had been ordered sold by the court to pay debts. It was also shown, that on the 1st of November, 1891, the administratrix paid \$171.50 on said mortgages—\$136 as interest on the first one, and the remainder, as principal on said second debt and mortgage, and that of the amount so paid, \$108 was paid out of the general funds of the estate, and not out of the rent of lands. The same evidence was offered by the administratrix as to said payments due the 1st of November, 1892, 1893, and 1894, and she claimed and asked a credit in proportion to the value of the two parcels of land—that belonging to the estate, and the portion of it which had been set apart to her as exempt. There were 320 acres under mortgage by the intestate. One hundred and twenty acres of this 320, had been set apart to the administratrix as a part of the homestead exemption allowed her. She contends that, as she made these annual payments out of the rents and profits of the 320 acres, she should be allowed credit for them, in proportion to the value of the respective parts of the lands, her portion being 120 and that of the estate 200 acres. When so allowed, the abstract states that her part was shown to be \$108; but it also states that it was shown that there was enough rent received from the land of the estate included in said mortgage to pay \$108 each year, except the year 1891. That year, it will be remembered, all the crops and rents were mortgaged to the Farmers & Merchants' Bank, and were appropriated in that direction. The court allowed the administratrix credit, each year, for \$68, which it is stated was her proportionate share of the rents. The creditors excepted to the allowance of any credits at all, and the administratrix excepted because she was not allowed credit for the \$108 each year. There was certainly no error in allowing her credits for annual payments of \$68, which was the ascertained rent of her share of the homestead land. That belonged to her, yet it was subject to the mortgage, and she appropriated it toward its payment. But why not have allowed her credit for the \$108 each year—the total rents received by her for the lands under mortgage, and devoted by ⁷²⁰ her to the extinguishment pro tanto of the mortgage debt? It was held by this court in *McNeill v. McNeill*, 36 Ala. 110, 76 Am. Dec. 320, that when it will promote the interest of an insolvent estate, the administrator has authority

to discharge encumbrances upon the property of the estate. Here were unforced mortgages on the lands of the estate; annual payments as specified in the mortgages had to be paid, or they became liable to foreclosure; these payments were small as compared to the value of the lands mortgaged, and the mortgage debts were scarcely more than half the value of the lands; the administratrix had procured an order of sale of the lands, and had, after exposing them twice to public sale, failed to get a bidder; the times and circumstances were unpropitious for a sale, and, under all the circumstances, we must hold that she did not act unwisely in renting the lands and devoting the rents received to relief of the lands under mortgage. Certainly, the creditors have shown nothing in her having done so of which they can complain.

4. It is too clear for consideration that the debts contracted by the widow in her own name for family supplies, after the date of the death of her husband and her own appointment as his administratrix, were not proper charges against his estate in her favor on settlement of his insolvent estate by her: *Wright v. Wright*, 64 Ala. 88. Nor was the \$3.75, costs paid by her to a justice of the peace in an attachment suit against a tenant in the year 1891, a proper credit. The tenant settled by turning over to the administratrix all the property attached before judgment, which was not enough to pay all he owed. She compromised with him, without an order of court, and paid the costs, which was not a preferred claim.

5. The court properly charged the administratrix with the \$50 rent for 1893, with which she failed to charge herself. She rented the land for \$150, and gave her personal security to a merchant to advance to the tenant during the year. He failed to make enough to pay the rent and advances. The crops were first appropriated to pay the advances, and after this there was not enough to pay the \$150 rent to the estate by \$50. What the advances amounted to in money, and the ⁷²¹ value of the crops raised is not made known, but it is fairly inferable the advances amounted to over \$50. Section 2446 of the code of 1876 provided that administrators and executors might rent the lands of deceased at public auction, securing the payment of the rent by notes or bonds with two good and sufficient sureties; and, when the interest of the estate required it, they might rent them privately, reporting that fact to the probate court. By the same section, carried into the code of 1886 as section 2102, it is not made the duty of an executor or administrator, in renting the lands of the estate, to require personal security, as under the former statute, and he may now rent them without demanding security for

the rent. The modification of the statute was suggested by the changed condition of affairs. Otherwise it might be that the lands could not be rented at all, if so, at very great sacrifice. Under the present statute, the personal representative is bound only to reasonable diligence and the exercise of fair judgment, in making rents. While, therefore, the executrix in the case before us, on the evidence submitted, was *prima facie* liable for the \$50 rent, she should be permitted to show that she acted judiciously, under the circumstances, for the best interest of the estate, and, if so, she should not be charged with the failure to collect the \$50.

It is unnecessary to consider the other assignments of error, as they are without merit.

These were cross-appeals, and as will appear, from the errors pointed out, the case must be reversed on each appeal.

Reversed and remanded.

CHATTEL MORTGAGE—UNPLANTED CROP.—A mortgage of unplanted crops is valid and creates an equitable lien, which attaches as soon as the crops come into existence, and may then be enforced: *Notes to McCaffrey v. Woodin*, 22 Am. Rep. 653; *Rochester Distilling Co. v. Rasey*, 40 Am. St. Rep. 640; *Cotten v. Willoughby*, 83 N. C. 75; 35 Am. Rep. 564. See discussion of the subject in the monographic note to *Moore v. Byrum*, 30 Am. Rep. 64, and note to *Long v. Hines*, 10 Am. St. Rep. 195. While a mortgage does not, in equity, pass the title to after-acquired property, it creates in the mortgagee an equitable interest therein which will prevail even against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and the beneficial interest is transferred to the mortgagee, the mortgagor being regarded as his trustee: *Borden v. Croak*, 131 Ill. 68; 19 Am. St. Rep. 23. That a lien in favor of the mortgagee of a growing crop, after severance and removal from the land, exists as against attaching creditors of the mortgagor, see note to *Gillilan v. Kendall*, 18 Am. St. Rep. 770. A chattel mortgage given upon an unplanted crop of corn creates no lien on the crop afterward planted and grown which will defeat the levy of an execution thereon made at the instance of a creditor of the mortgagor before possession of the crop taken by the mortgagee, although the mortgage was duly filed for record before the levy was made: *Long v. Hines*, 40 Kan. 216; 10 Am. St. Rep. 189. For other cases showing that a chattel mortgage of a crop to be grown in the future, but which has not been planted at the time of the execution of the mortgage, is void as against subsequent purchasers or attaching creditors, see note to *Rochester Distilling Co. v. Rasey*, 40 Am. St. Rep. 640.

EXECUTORS AND ADMINISTRATORS—SKILL AND DILIGENCE.—An administrator is required to use that degree of skill and diligence, in the management of his trust duties, which is reasonably expected to be exercised by a man of fair average capacity and ability in the transaction of his own business. He must use reasonable diligence in collecting for the benefit of the estate: See monographic note to *Tarver v. Torrance*, 12 Am. St. Rep. 311, on skill and diligence required of an administrator.

SMITH v. STATE.

[108 ALABAMA, 1.]

INCEST.—THE CONSENT OF BOTH PARTIES is not essential to the crime of incest, and the defendant may be convicted of that crime, though in committing it he employed the force essential to the crime of rape.

ACCOMPLICE—INCEST.—If the crime of incest is committed through fear or force, the person against whom such fear and force were employed is not an accomplice, and her testimony does not require corroboration.

W. C. Fitts, attorney general, for the state.

² **McCLELLAN, J.** Appellant was indicted and convicted of the statutory crime of incest committed by one act of sexual intercourse with his daughter. The evidence tended to show that the daughter did not consent to the act, but that the defendant accomplished his purpose by force or by putting her in fear. Several charges were requested for the defendant which raise the question whether this offense can be committed unless the parties mutually consent to the act. Of this point it is said in 10 American and English Encyclopedia of Law, page 341: "Upon the question whether a person indicted for incest can be convicted, when the proof shows facts constituting the crime of rape, the decisions are conflicting. It has been held that the crime can only be incest when the sexual act is committed with mutual consent; but the weight of authority seems to be to the effect that where incestuous fornication is shown to have been committed by defendant, in full knowledge of the relationship between himself ³ and the other participant, the fact that he may have or did use force in the accomplishment of his object is entirely immaterial, and he may be convicted of the crime of incest notwithstanding." This is an open question in Alabama. There is nothing in our statute defining the offense to prevent us from taking ground with what is said in the text quoted to be the weight of authority; but, to the contrary, every element of the crime as denounced in our law may well exist as against one party to the sexual act though the other did not consent thereto and though the act was only accomplished by the man by such force or coercion brought to bear on the woman as would render the man guilty also of rape: Code, sec. 4013. And we see no reason why in such case the man should not be convicted of incest upon or by analogy to the general principle that a conviction may be had for any less offense included in a greater one. We therefore hold that the several charges requested by the defendant below were properly refused.

The charge given at the instance of the state, to the effect

that if the deed was accomplished by the use of force or that the woman allowed the defendant to have intercourse with her through fear, she is not an accomplice of the defendant, and that of consequence her testimony does not, as matter of law, require corroboration, is a sound exposition of the law: Wharton's Criminal Evidence, sec. 440; Freeman v. State, 11 Tex. App. 92; 40 Am. Rep. 787.

Affirmed.

INCEST—CONSENT OF WOMAN, WHETHER NECESSARY TO CRIME.—One accused of incest cannot escape conviction on the ground that the female upon whom the crime was committed did not consent thereto. That the act so committed also constitutes the crime of rape does not prevent it from constituting the crime of incest: State v. Chambers, 87 Iowa, 1; 43 Am. St. Rep. 349, and note. See, also, the extended note to Commonwealth v. Bakeman, 41 Am. Rep. 249.

INCEST—ACCOMPLICES.—A woman who consents to the crime of incest knowingly, voluntarily, and with the same intent which actuated the man, is his accomplice, otherwise if she was the victim of force, threats, fraud, or undue influence: Shelly v. State, 95 Tenn. 152; 49 Am. St. Rep. 926, and note.

STATE v. BRISTOL SAVINGS BANK.

[108 ALABAMA, 3.]

A FOREIGN CORPORATION IS GUILTY OF DOING BUSINESS WITHIN THE STATE if it makes a single loan to a resident thereof, and takes therefor promissory notes secured by a mortgage upon real property situate within the state, though such notes are payable in the state wherein the corporation has its residence.

AGENCY, WHEN EXISTS, IS A QUESTION FOR THE JURY.—The testimony of a witness that he acted as the agent of one of the parties to a transaction is not conclusive. The jury may be justified from all the circumstances in finding that he was the agent of the other party, rather than of the one he claims to represent, as where, though he claims to be the agent of the borrower, and not of the lender, he was charged with the duty of examining the property offered as security, reporting the result of his examination to the lender, and afterward of examining the records to see whether the lien of the mortgage was perfect.

W. H. Thomas, for the appellant.

⁵ McCLELLAN, J. This is an action prosecuted by the state against the Bristol Savings Bank, a foreign corporation, for the recovery of the penalty prescribed by the act of 1887, "To give force and effect to section 4 of article 14 of the constitution of Alabama," ⁶ it being alleged that said corporation did business in this state without having complied with the provisions of that act: Acts 1886-87, pp. 102-104. There is no question that the

evidence adduced went to show every fact essential to a recovery, unless it be that there was failure of proof of the main fact that the defendant did business in this state. The judge of the trial court thought there was no evidence of this fact, and upon that theory gave the affirmative charge for the defendant. We think he reached a wrong conclusion in this regard, and erred in giving the general charge against the state.

The business upon the doing of which the plaintiff relied for a recovery was the loan of money by the defendant to a resident citizen of this state, and the taking of a mortgage upon land of the borrower situated in this state to secure the debt, which was evidenced, also by promissory notes, with separate notes for installments of the interest. Under the constitution and the statute, a single act of business done, without complying with the prescribed conditions, is a violation of both; there need not be a carrying on of business. The loan of money here and the taking here of notes and mortgage to secure repayment, the mortgage being on land situated in this state, is the doing of business here within both the constitution and the statute: *Ginn v. New England Mortgage Security Co.*, 92 Ala. 135; *Farrior v. New England Mortgage etc. Co.*, 88 Ala. 275; *Mullens v. American etc. Mortgage Co.*, 88 Ala. 280. And the facts that the notes and mortgage are executed here, though they may be payable elsewhere, and the land embraced in the mortgage is situated here, are sufficient to show *prima facie* that the transaction involves the doing of business by the lender and mortgagee in the state of Alabama: *Farrior v. New England Mortgage etc. Co.*, 88 Ala. 275; *Mullens v. American etc. Mortgage Co.*, 88 Ala. 280. There is evidence of both these facts in this record, and it follows that the plaintiff made its *prima facie* case against the defendant. The witness Oliver for the defendant testified without objection that he, as the agent of the borrower, negotiated the loan outside of the state and that in respect of it he was not the agent of the defendant. These are conclusions of the witness. If they are not borne out by the facts of ⁷ the transaction in the judgment of the jury properly instructed by the court as to what constitutes agency, the conclusions amount to nothing; or, to state the proposition differently, the jury must look to all the evidence bearing upon the question of agency, including the conclusion of Oliver received without objection that he was not defendant's agent in ascertaining whose agent he was, and there may be other facts which will justify them in reaching a different conclusion than that reached by the witness. There is also a contract in evidence by which the borrower formally constitutes one Barker his agent to negotiate the

loan, the application being forwarded by Oliver to Barker. But, notwithstanding this, it was open to the plaintiff to show that Barker really acted as the agent of the lender: *Larson v. Lombard etc. Co.*, 51 Minn. 141. Indeed, in this very paper, contract, or application which is relied on as constituting Barker the agent of the borrower, there are stipulations of manifest benefit to the lender, to which it is proper for the jury to look in determining whether Barker was not also, in a sense and to some extent, the agent of the defendant. Such for instance as the following: "Said mortgage . . . to contain such conditions as are usually exacted by agents who negotiate five year loans in this state." Barker was an agent negotiating a five year loan, and it is a little incongruous that he, solely as the agent of the would-be borrower, should exact of his principal, for the benefit of the lender, whose agent he was not at all, according to the theory of the defense, conditions which agents usually exact from their principal, while acting for their principal for the benefit of a stranger. And so there are stipulations that the borrower's agent shall pay off all prior liens and shall insure the property for the better security of the stranger with whom he is theoretically dealing at arm's length solely in the interest of his principal. These are circumstances, it may be of light importance, for the consideration of the jury. And it is shown clearly that Barker was the agent of the defendant in the management and collection of the loan.

In the testimony of Oliver it was made to appear that he, while professing to act only for the borrower, did several things in Alabama which were in no sense incumbent on the borrower, nor to his advantage, but ⁸ which were to the advantage and essential to the security of the Bristol Savings Bank; and other things of this nature he did confessedly, not as the borrower's agent, but as the "correspondent" of Barker, and these acts were not within the terms of the borrower's appointment of Barker as his agent. For instance, he was required by Barker after the loan had been accepted, the papers signed, and the money paid into his hands, "to re-examine the records of the courts, and he did re-examine the records of the courts to see that the lien given by the mortgage was perfect"; and he testified that, if the records had not been clear, "he would and could have refused to have paid over the money to Dyer, the borrower, and that it would have been his duty to so have refused." And so, for further example, Oliver testified that one of the papers made out at the time of Dyer's application he had signed, "E. M. Oliver, correspondent," and that he "had to examine the lands offered by Dyer as security, and that he did see the lands and reported as to security, values

of land, buildings, and improvements on the same to Barker, and in which report, he reported as "correspondent," all which was without Dyer's request. These are but instances of the evidential circumstances which cropped out in the testimony of Oliver to be considered by the jury in determining whether the *prima facie* case made in the outset for the plaintiffs had been overturned by the testimony adduced for the defendant. However strong or weak they may be—and upon that nothing we have said must be taken as indicating any opinion on our part—they constituted some evidence to go to the jury as tending to show that Barker and Oliver were in some sort the agents of the defendant in this transaction, in such sense as that what they did here was the doing of business in Alabama by the Bristol Savings Bank. The affirmative charge took all this away from the jury; it should have been submitted to them: *Jesson v. Texas Land etc. Co.*, 3 Tex. Civ. App. 25.

For this error the judgment of the circuit court is reversed. The cause is remanded.

CORPORATIONS—FOREIGN—DOING BUSINESS WITHIN STATE.—The taking of a single mortgage in this state by a foreign corporation to secure a pre-existing debt for goods sold in another state is not doing business within the state within the meaning of a statutory or constitutional provision prohibiting the doing of such business except where the corporation maintains one or more places of business within the state and an authorized agent on whom process against it may be served: *Florsheim etc. Dry Goods Co. v. Lester*, 60 Ark. 120; 46 Am. St. Rep. 162, and note.

AGENCY—QUESTION OF LAW AND FACT.—Whether an agency exists under an ascertained state of facts is a question of law to be determined by the court, but it is within the province of the jury to find whether the facts necessary to establish the agency exist: *Seehorn v. Hall*, 130 Mo. 257; 51 Am. St. Rep. 562, and note.

BERNEY v. STEINER BROTHERS.

[108 ALABAMA, 111.]

NEGOTIABLE INSTRUMENTS, EVIDENCE OF OWNERSHIP.—The possession of a note indorsed in blank is *prima facie* evidence of ownership, and, in the absence of rebutting evidence, entitles the plaintiff to recover thereon. The indorsement need not be filled up before offering the note in evidence.

NEGOTIABLE INSTRUMENT IN THE POSSESSION OF THE PAYEE.—If a negotiable instrument, though it has been indorsed, comes again into the possession of the payee, he is entitled to recover thereon, regardless of its condition as to indorsement, unless the defendant can establish the plaintiff's want of title.

PRACTICE.—NO DEPARTURE FROM A COMPLAINT on a negotiable instrument arises from a replication filed by the plaintiff alleging the true nature of his ownership, though his source of title is not the same as disclosed in the complaint.

Action by Steiner Brothers against William Berney upon a promissory note, alleged in the complaint to have been made by the defendant payable to his own order and indorsed by him to the plaintiffs. The answer denied the legal title of the plaintiffs, and alleged that the note had been indorsed by the defendant in blank, and that the consideration therefor did not move from the plaintiffs, and the note was not paid to them, and that they were not the owners thereof at the commencement of the action, but that it was the property of Rich & Biederman, and that while the plaintiffs were second indorsers of the note, they had not paid nor otherwise transferred it. The plaintiffs by their replication stated that the defendant indorsed the note in blank, and then it was indorsed in the same manner by plaintiffs, and delivered to Rich & Biederman under an agreement that they were not to negotiate it, but that if it were not paid, the plaintiffs were to exhaust all remedies under the note and certain collaterals that had been given by the defendant, and thereafter pay to Rich & Biederman any balance which might remain, and Rich & Biederman, after default in the payment of the note, delivered it and the collateral securities to plaintiffs to enable them to exhaust all remedies thereon, and that for such purpose the present action was prosecuted. A demurrer to the replication was overruled. On the trial the note was received in evidence, against the objections of the defendant, and appeared to be indorsed "William Berney," "Steiner Bros." Judgment was given in favor of the plaintiffs, and the defendant appealed.

J. Q. Cohen and H. R. Dill, for the appellant.

George Huddleston and Cabaniss & Weakley, for the appellees.

¹¹⁶ HARALSON, J. It seems to be well settled generally that the possession and production by the plaintiff of a note sued on, with the blank indorsement of defendant, who is the maker, payee, and indorser of the same, is *prima facie* evidence of his ownership of the note, and, in the absence of rebutting proof, shows his right to maintain the action in his own name: *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505. This rule, it was said in the case cited, may be regarded as settled in this state; that "it was held, more than fifty years ago, that a blank indorsement vests the note in the holder, if the owner, as completely as can be done by any other mode, and it is unnecessary for the indorsement

to be filled up before going to the jury": *Riggs v. Andrews*, 8 Ala. 628; *Sawyer v. Patterson*, 11 Ala. 523; *Pickett v. Stewart*, 12 Ala. 202. And in *Bancroft v. Paine*, 15 Ala. 834, it was held that an agent to whom a note indorsed in blank had been transmitted for collection might sue on it in his own name. The principal alone has the right to object: *Goodman v. Walker*, 30 Ala. 482; 68 Am. Dec. 134. And still again, we have more recently held that when the paper, though indorsed and transferred, gets back in the hands of the payee, the law converts his possession into a prima facie legal title, upon which suit may be prosecuted, wholly regardless of the condition of the paper as to its indorsements, and the burden is on the defendant to show want of title in the plaintiff: *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606; *Tuskaloosa Cotton etc. Co. v. Perry*, 85 Ala. 165; *Price v. Lavender*, 38 Ala. 389; *Herndon v. Taylor*, 6 Ala. 461.

It has been further held that when a note is payable in bank, the legal title, and not the beneficial interest in the collection, controls. That the holder of the legal title is not entitled to the proceeds is no defense to an action on the note: *Hanna v. Ingram*, 93 Ala. 483; Code, sec. 2594.

In a recent decision in the Illinois court, the case we ¹¹⁷ have before us, in its essential features, was passed on by that court. *H. M. and F. R. Henderson* gave a note payable to Phillips, who, as alleged in the declaration, assigned the same to Davisson. The defendant offered evidence that the plaintiff delivered the note indorsed by him in blank to a bank, as collateral security for a note given by him to the bank, and that, in order to enable the plaintiff, Davisson, to sue upon said note, the bank gave it to his attorney for that purpose. Judgment having been rendered for plaintiff, on appeal, the appellate court said: "The plaintiff having shown the making of the note and its indorsement to him as alleged, and being in possession of it, would not be barred of the action merely by the fact that his own name appeared indorsed on the instrument. . . . It is not a matter as to which the maker may object. In such case, the plaintiff may strike the blank indorsement or not, as he prefers. The judgment will protect the maker against another action, and it is not material to him what may be the rights of the plaintiff and another party as to the beneficial interest in the judgment.

"The note and the indorsement to plaintiff were properly admitted in evidence, nor did the proof offered by defendants make any important change in the situation. The substance of the matter was merely that while the bank retained a beneficial interest in the note, the possession of it was surrendered for the ex-

press purpose of allowing the plaintiff to sue in his own name, thus restoring to him the legal title to the paper. There is nothing here of which the makers can complain": *Henderson v. Davisson*, 57 Ill. App. 17.

This decision seems to be in line with our own adjudications, referred to above, and supported by authority elsewhere: *French v. Jarvis*, 29 Conn. 348; *Eaton v. Alger*, 47 N. Y. 345; 3 *Randolph on Commercial Paper*, sec. 1658.

There was no departure from the complaint, as is supposed by appellant's counsel, in the replication filed, and the demurrer to it was properly overruled. The replication to the plea was good, and it was satisfactorily established by the evidence. By the very terms of the agreement entered into between plaintiffs and Rich & Biederman at the time said note was given and indorsed by plaintiffs, it was stipulated "that it is hereby understood and agreed that Rich & Biederman, the ¹¹⁸ holders of the note aforesaid, will not negotiate the same, but if the said William Berney should fail to pay said note, said Steiner Brothers are first to exhaust all remedies under the note and securities, and, if there should then be a balance due on said note, Steiner Brothers are to pay the same to Rich & Biederman." The note, not having been paid by defendant at maturity, was, under this agreement, properly returned to plaintiffs, who were authorized and entitled to maintain this action to enforce the payment of the same out of defendant. Their right to sue accrued to them, certainly, under their said contract with Rich & Biederman, of which defendant had no right to complain. The note was properly admitted in evidence and the objections raised by appellant to the introduction of evidence as to the circumstances and conditions of its execution, on which assignments of errors are based, were also without merit.

There were other errors insisted on, which were not meritorious and we will not consider them.

There was no error in giving the general charge as requested for plaintiffs.

Affirmed.

NEGOTIABLE INSTRUMENTS.—THE POSSESSION OF A NEGOTIABLE INSTRUMENT by a payee is *prima facie* evidence of title in him, whether his name is indorsed thereon or not: *Middleton v. Griffith*, 57 N. J. L. 442; 51 Am. St. Rep. 617, and note.

AMERICAN FREEHOLD LAND MORTGAGE COMPANY v.
THORNTON.

[108 ALABAMA, 258.]

A CERTIFICATE OF THE ACKNOWLEDGMENT OF A DEED IS NOT OPEN TO IMPEACHMENT by parol evidence to the effect that the wife did not acknowledge before the notary, and was not by him examined separate and apart from her husband, when she confessedly signed the instrument in the presence of the notary, who was then at her house for the purpose of taking the acknowledgment, and no fraud or duress is shown.

HUSBAND AND WIFE, APPLICATION OF HER PROPERTY TO THE PAYMENT OF HIS DEBTS.—Where money is loaned to, and services are rendered for, a husband and wife, she cannot avoid a mortgage upon her separate property, given to secure repayment, on the ground that the transaction involved the application of her property to the payment of his debts, the money having been paid to him and the greater part squandered by him or exhausted in the payment of his debts.

Suit to foreclose a mortgage upon certain lands, executed by M. J. Thornton and wife. One of the defendants, a loan company, pleaded, by way of cross-bill, a mortgage given to it of a subsequent date to the plaintiff's mortgage. The wife pleaded that she was induced through fear to sign both mortgages, and that she did not acknowledge either, and that the officer whose certificate of acknowledgment was attached to both was an agent of the plaintiff acting in concert with her husband to perpetrate a fraud upon her. She also claimed that a part of the mortgaged land was her separate estate, and that the debt for which the mortgage was given was the debt of her husband only. On the trial it appeared that the mortgages were signed by the husband and wife in the presence of two witnesses, and that the certificates of acknowledgment were made by a notary, who took the mortgages to the home of the wife for the purpose of having them there executed, and that she there signed them in his presence. The husband and wife and one of the subscribing witnesses testified that she did not acknowledge the execution of the instrument before the notary, and that she was not examined by him separate and apart from her husband. The chancellor decreed that the mortgages were void, and the complainant appealed.

M. E. Milligan and Pettus & Pettus, for the appellant.

M. Sollie, for the appellee.

260 McCLELLAN, J. The mortgages of the American Freehold Land Mortgage Company, and the Loan Company of Alabama, involved in this case, each embracing, along with other land, the homestead of the mortgagors, were confessedly signed

by Thornton and his wife in the presence of Manghen, the notary public ²⁶¹ who brought them to the residence of the mortgagors for the purpose of having them properly executed. On these facts—the presence of the officer for the purpose stated the presence of the instruments themselves, the presence of the grantors for said purposes, and the signing of the papers then and there by them—the notary's certificates of acknowledgment of the husband and the separate acknowledgment of the wife are not open to impeachment by parol evidence, no fraud or duress having been shown: *American etc. Mortgage Co. v. James*, 105 Ala. 347; *Jinwright v. Nelson*, 105 Ala. 399; *Grider v. American etc. Mortgage Co.*, 99 Ala. 281; 42 Am. St. Rep. 58.

The further attack upon these mortgages, in so far as they cover certain lands which belonged to Mrs. Thornton, which proceeds on the theory of their invalidity to that extent, because, as is insisted, the transaction involved the application of her property to the payment of her husband's debts, is equally untenable. The debts secured by the mortgages were the debts of both husband and wife for money then loaned to them and for services then rendered to them jointly. That the money loaned to them was paid to the husband for himself and wife, presumably with the latter's consent, and was in greater part squandered by him and in other and small part incidentally expended by him in the payment of debts which he owed—dispositions with which the complainant mortgage company had no connection, and which are chargeable solely to the wife's complaisance—is of no consequence; she cannot now claim immunity of her land merely because she allowed her husband to receive the whole fund, acting, as he did, for himself and as her agent, and to divert or convert her share of it, the mortgagors having no notice of its contemplated, or even consummated, misapplication.

The chancellor held the mortgages void. That was error. The decree must be reversed; and it will be here decreed that the complainant is entitled to the relief prayed in the bill, that the Alabama Loan Company is entitled to the relief prayed in its cross-bill, and that the register will take and state an account of the amount, principal and interest, due on the mortgages of said complainant and cross-complainant, and make report of his proceedings hereunder to the next term of the ²⁶² chancery court of Dale county, to the end that said mortgages may be foreclosed by the proper order of said court, and for such purpose this cause is remanded thereto.

Of the Conclusiveness of Certificates of the Acknowledgment of Deeds.

General System Respecting Acknowledgments—Under the American system, by which provision is made for the registration and recording in some public office of instruments in writing affecting the title to real property, and by which all persons subsequently dealing with such property are charged with notice of instruments so recorded, and such instruments are given preference over other instruments, though of prior date, not so recorded, it is natural, and perhaps indispensable, that some provision should be made for the authentication of writings offered for record, without which they are not entitled to be recorded, and by virtue of which they are so entitled and their due execution is deemed to be proved, at least, *prima facie*. This authentication, as usually provided for, consists of the certificate of some public officer, attested with his official seal, if he has one, and stating in substance that the person named therein was personally known to the officer, and appeared before him at a time specified, and acknowledged that he executed the instrument. If the grantor, or one of the grantors, is a married woman, the statutes frequently prescribe that the officer shall inform her, without the presence and hearing of her husband, of the contents of the instrument, and shall thereafter inquire whether she executed it freely and voluntarily and without the fear and compulsion of her husband. Except when the grantor is a married woman, the acknowledgment is usually not essential to the validity of the instrument, and it may, though not acknowledged, be given effect, if its execution is otherwise proved in any case in which it is in issue. As to married women, the American statutes usually, if not universally, make the acknowledgment a part of the execution of the writing, and deny it any effect unless it has been acknowledged before a proper officer, though its execution is otherwise complete, and, except in those cases where the statute has provided for the perfecting of certificates of such acknowledgment, the absence of a sufficient certificate thereof is fatal to a married woman's deed. Though the certificate is perfect in every respect she may insist that it is false; and then the question arises whether it is conclusive against her, or is but *prima facie* evidence of the facts stated in it. Upon this subject there is a radical difference of opinion, though, perhaps, it is not so great in its practical effect as would seem from isolated paragraphs from the opinions of the many judges who have been called upon to determine it.

Is the Taking an Acknowledgment a Judicial Act?—In the first place, there is a difference of opinion respecting the character of the functions performed by the officers who are authorized to take and certify acknowledgments. Judicial officers are almost universally authorized to perform these functions, but their performance is also deputed to officers who are not judicial, and in the vast majority of cases such acknowledgments are taken and certified by clerks of court, notaries public, commissioners of deeds, and other officials but remotely connected with the judiciary. We are not able to understand why the duties performed by them respecting the acknowledgment of writings is any more judicial in its character than

are their duties when they present a negotiable instrument to the maker, demand payment thereof, and afterward make a certificate showing such demand and the resulting dishonor of the instrument. Nevertheless, the judiciary of many of the states have determined that the duties involved in the acknowledgment of a deed, whether performed by a judge or not, are judicial in their nature and to some extent, at least, in their effect: *Lickmon v. Harding*, 65 Ill. 505; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Murrell v. Diggs*, 84 Va. 900; 10 Am. St. Rep. 893; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622. "The duty of examining the wife privily and apart from her husband, of explaining the deed to her fully, and of ascertaining that she executed it of her own free will, without coercion or influence of his, is a duty imposed by law upon the officer, involving the exercise of judgment and discretion, and this a judicial or quasi-judicial act. The magistrate is required to ascertain a particular state of facts, and, having ascertained it, to certify it for record, for the benefit of the parties to the deed, and of all others who may thereafter acquire rights under it. And the statute expressly provides that upon the recording of the certificate 'the deed shall be as effectual in law as if she had been an unmarried woman.' The reasonable, if not the necessary, conclusion is, that, except in case of fraud, the certificate, made and recorded as the statute requires, is the sole and conclusive evidence of the separate examination and acknowledgment of the wife": *Hitz v. Jenks*, 123 U. S. 297.

Consequences of Regarding the Act of the Officer as Judicial.—Wherever this opinion prevails the certificate of acknowledgment, signed and attested by the proper officer in due form, must have the conclusiveness of a judgment. To a judgment it is essential that the judge have jurisdiction over the person against whom it is rendered, but having such jurisdiction, it is not material, except upon appeal, whether he committed errors in its exercise or not. From a certificate of the acknowledgment of a writing there is no appeal. Hence, if it be a judicial act, there can be no means of avoiding its effect, except such as might be employed to avoid the effect of a judgment not subject to review in any appellate tribunal, and these are: 1. To prove that the court did not have jurisdiction over the parties; or 2. To resort to a court of equity and there establish such circumstances of fraud, accident, or mistake as will induce that court to enjoin the adverse party from enforcing, or otherwise relying upon, the decision in his favor. Some courts hold that the jurisdiction of a court or judge cannot be collaterally controverted, and nearly all courts insist that relief cannot be had in equity against a judgment because of fraud, accident, or mistake as against an innocent purchaser or encumbrancer. It must, therefore, follow that if the certificate of the acknowledgment of a writing is an official act, some courts will insist that it cannot be controverted at all, except for fraud, accident, or mistake, and then only as against persons charged with notice thereof or who have not parted with any valuable consideration, relying in good faith upon such certificate.

Want of Jurisdiction on the Part of the Officer.—If the taking of an acknowledgment is a judicial act, and the certificate has the

attributes of a judgment, then the next inquiry is, whether or not the officer certifying the acknowledgment shall be treated as acting as a court of record of general jurisdiction, so that his action is not subject to attack upon the ground that the person whose acknowledgment has been certified did not appear before him nor otherwise submit to his jurisdiction. There are, indeed, decisions maintaining in general terms that a certificate of acknowledgment is not subject to disproof unless attacked for fraud, accident, or mistake, of which the person relying upon the acknowledgment had no notice: *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89. If such is the law, then these certificates are as sacred from collateral assault as are judgments of courts of record of general jurisdiction. In one instance, though the court was apparently not satisfied with the evidence tending to impeach a certificate of acknowledgment, it did not rest its judgment wholly upon that ground, but upon broad principles of public policy, claiming that those principles required that persons dealing with the title to real property should be enabled to implicitly rely upon recorded deeds in due form and apparently properly acknowledged before officers authorized to take and certify their acknowledgment. The acknowledgment in question was that of a married woman, and there was testimony to the effect that she neither signed nor acknowledged the deed. The court, however, said: "This court has often said, that the provision of the law authorizing a justice of the peace, or other designated officer, to take the private examination of a wife, was designed as a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand, might be guarded, and a sure, indefeasible, and unquestionable transfer of her right secured on the other. It cannot be supposed, whilst the legislature were protecting the wife, they had no regard to the importance of inspiring confidence in the title. They knew well the ruinous consequences which would ensue from doubt and uncertainty as to titles to land, and nothing better calculated to create such doubts could be conceived than the privilege at any period, no matter how remote, of alleging and proving that the certificate of the magistrate is false. The proceeding by fine and recovery never could be contradicted; why, then, should its substitute be subjected to that test? No man can be content with a title, in all respects perfect upon its face, when, upon the death of his vendor, his widow, with the assistance of the magistrate, or without it, as in this case, may undo what they have solemnly done, and without the possibility of contradiction, since the magistrate and the wife are alone privies and parties to her examination. Of what value would privy examinations be, where the wife has been quiet during the lifetime of her husband, and conjures up, at a remote day, objections which are allowed to prevail? Who would take a deed to which a married woman is a party, with these probable direful results staring him in the face? Everything in relation to titles would be thrown into confusion, and irretrievable mischief would be the certain consequence": *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634. We believe no other opinion can be found so extreme in character as this, and we doubt whether it would be followed in the same court in any case in which it clear-

ly appeared that the person whose acknowledgment was certified never in fact appeared before the magistrate certifying it, nor made, nor authorized the making of, any acknowledgment whatever. In Kentucky, a statute has been enacted declaring that "no fact officially stated by an officer in respect to a matter of which he is required to make a statement in writing, whether in the form of a certificate, return, or otherwise, shall be called into question, except upon the allegation of fraud in the person benefited thereby or mistake on the part of the officer, unless in a direct proceeding against the officer and his sureties." Under this statute, it has been held that an acknowledgment could not be impeached on the ground that it was taken by an officer out of the county in which he was authorized to act, and in which the certificate stated the acknowledgment to have been made: *Cox v. Gill*, 83 Ky. 669; *Davis v. Jenkins*, 93 Ky. 353; 40 Am. St. Rep. 197. Perhaps a statute of the character quoted may be construed as precluding every person whose acknowledgment has been falsely certified from proving that he or she never appeared before the officer at all, though, in our judgment, such a construction must make the statute unconstitutional as an attempt to deprive persons of property without due process of law. However this may be it is quite certain that even in those states wherein the taking of a certificate is deemed a judicial act, but which are not controlled by statutes of this character, the certificate may be impeached by proof that it is entirely false, and that there was no appearance before the officer and no authorization to him to certify the acknowledgment: *Grider v. American etc. Co.*, 99 Ala. 281; 42 Am. St. Rep. 58; *Donahue v. Mills*, 41 Ark. 421; *Smith v. Ward*, 2 Root, 378; 1 Am. Dec. 80; *Phillips v. Bishop*, 31 Neb. 853; *Williamson v. Carskadden*, 36 Ohio St. 664; *Michener v. Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622.

If, on the Other Hand, there was an Appearance before an Officer by the parties affected by the certificate, such as to give him authority over them, at least in the states where his action is deemed to be judicial, no error on his part can make it void, provided his certificate states the facts essential to its validity. As against assault on the ground that he did not fully perform his duties, as where it is claimed that he did not inform a wife of the contents of an instrument, or did not examine her without the hearing of her husband, or on the ground that, though the examination was complete, the wife was under the coercion of her husband, or on the ground that the acknowledgment of the execution of the instrument was induced by fraud, the certificate is impregnable. The instrument must be regarded as properly executed, and while it may, as a judgment might, be avoided for fraud or duress, this result, as in the case of a judgment, so procured, cannot be permitted to operate as against innocent purchasers or encumbrancers in good faith and for a valuable consideration: *Giddens v. Bolling*, 99 Ala. 319; *Grider v. American etc. Co.*, 99 Ala. 281; 42 Am. St. Rep. 58; *Holt v. Moore*, 37 Ark. 145; *Meyer v. Gossett*, 38 Ark. 377; *Donahue v. Mills*, 41 Ark. 421; *Petty v. Grisard*, 45 Ark. 117; *Baldwin v. Snowden*, 11 Ohio St. 203; 78 Am. Dec. 303; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46;

Singer etc. Co. v. Root, 84 Pa. St. 442; 24 Am. Rep. 204; Kocourek v. Marak, 54 Tex. 201; 38 Am. Rep. 623; Webb v. Burney, 70 Tex. 322; Hitz v. Jenks, 123 U. S. 297.

As to those cases where the party is stated in the certificate to have acknowledged the deed, but who never in fact appeared before the officer nor otherwise acknowledged it to or before him nor authorized him to certify that such acknowledgment was made, it is not material whether the act of taking and certifying the acknowledgment be regarded as judicial or not, for if it be judicial, there is no jurisdiction, and the certificate may be proved to be void by any satisfactory evidence. Upon this all the courts, with the possible exception of Illinois, agree, though some of them regard the taking and certifying the acknowledgment as a judicial act, while others regard it as ministerial: *Holt v. Moore*, 37 Ark. 145; *Moore v. Hopkins*, 83 Cal. 270; 17 Am. St. Rep. 248; *Van Orman v. McGregor*, 23 Iowa, 300; *Borland v. Walrath*, 33 Iowa, 130; *Dodge v. Hollingshead*, 6 Minn. 25; 80 Am. Dec. 433; *Edgerton v. Jones*, 10 Minn. 427; *Pierce v. Georger*, 103 Mo. 540; *Barrett v. Davis*, 104 Mo. 549; *Comings v. Leedy*, 114 Mo. 454; *Jackson v. Schoonmaker*, 4 Johns. 161; *Jackson v. Perkins*, 2 Wend. 308; *Hays v. Hays*, 5 Rich. 31.

An acknowledgment must have been intended by the party as such, and therefore a notary is not authorized from hearing a person testify in a deposition to the execution of a deed to indorse thereon his certificate of such execution, and a certificate based upon such evidence or upon any mere admission of a party who did not intend thereby to authorize the officer to certify to the acknowledgment may be regarded as not taking place in the official presence of the officer, and therefore is void: *Breitling v. Chester*, 88 Tex. 586.

It may be that the party whose acknowledgment is certified appeared before the officer for the purpose of making an acknowledgment, or, at least, signed the instrument in question, knowing that it was to be delivered to an innocent grantee with the certificate of acknowledgment indorsed thereon in some form, and then the question will arise whether the certificate may be avoided because of any error, omission, or misconduct on the part of the officer taking the acknowledgment. The statutes upon this subject require officers, before certifying the acknowledgment of married women, to examine them, without the presence and hearing of their husbands and upon such examination to inform them of the contents of the instrument and to ascertain whether it was executed freely and without any compulsion, and such statutes were undoubtedly intended for the protection of wives, who might otherwise act through fear or in the absence of a proper knowledge of the nature of the act, and decisions which hold that certificates of acknowledgment are binding upon them, though the officer making such certificate did not observe the statutory requirements, tend very far toward the subversion of the objects sought to be accomplished by the statutes. On this account, the decisions in several of the states clearly indicate that a certificate of the acknowledgment of a married woman may be impeached, even as against an innocent purchaser or encumbrancer, and though she appeared before the officer, by proof either that he did not inform her of the contents of the writing and that

she did not understand it, or that she did not act freely and voluntarily and did not so state to him: *Dodge v. Hollingshead*, 6 Minn. 25; 80 Am. Dec. 433; *Edgerton v. Jones*, 10 Minn. 427; *Wannell v. Kern*, 57 Mo. 478; *Steffen v. Bauer*, 70 Mo. 399; *Mays v. Pryce*, 95 Mo. 603; *Hays v. Hays*, 5 Rich. 31; *Garth v. Fort*, 15 Lea, 683. We think, however, that these views, though entirely reasonable, are not sustained by the weight of authority upon the subject. The language generally employed by the courts is, that in such cases the acknowledgment cannot be impeached except for duress or fraud, and then only against persons having notice thereof, and that when the officer had authority to take an acknowledgment, it cannot be impeached by proving that he did not perform his duty in some respect, as that he did not inform the wife of the contents of the instrument on an examination without the hearing of her husband, or did not ask her whether she executed it freely and voluntarily: *Worrell v. McDonald*, 66 Ala. 572; *American etc. Co. v. James*, 105 Ala. 347; *Jinwright v. Nelson*, 105 Ala. 399; *Shelton v. Aultman*, 82 Ala. 315; *Meyer v. Gossett*, 38 Ark. 377; *Banning v. Banning*, 80 Cal. 271; 13 Am. St. Rep. 156; *Oliphant v. Leversidge*, 142 Ill. 160; *Barnett v. Shackelford*, 6 J. J. March. 532; 22 Am. Dec. 100; *Tichenor v. Yankee*, 89 Ky. 508; *Baldwin v. Snowden*, 11 Ohio St. 203; 78 Am. Dec. 303; *Moore v. Fuller*, 6 Or. 272; 25 Am. Rep. 524; *Jamison v. Jamison*, 3 Whart. 457; 31 Am. Dec. 536; *Schrader v. Decker*, 9 Pa. St. 14; 49 Am. Dec. 538; *Williams v. Baker*, 71 Pa. St. 476; *Miller v. Wentworth*, 82 Pa. St. 280; *Carr v. Frick etc. Co.*, 170 Pa. St. 62; *Hartley v. Frosh*, 6 Tex. 208; 55 Am. Dec. 772; *Wiley v. Prince*, 21 Tex. 637; *Pool v. Chase*, 46 Tex. 207; *Williams v. Pouns*, 48 Tex. 141; *Miller v. Yturria*, 69 Tex. 549; *Harkins v. Forsythe*, 11 Leigh, 306; *Burson v. Andes*, 83 Va. 445; *Rollins v. Menager*, 22 W. Va. 461; *Mather v. Jarel*, 33 Fed. Rep. 366. Perhaps in a majority of these cases either the evidence against the acknowledgment was not satisfactory, or the delay in attacking it had been so great as to indicate a doubt of the good faith of the attacking party, and the probability that she fairly understood her act when it was done, and that her final repudiation of it was an afterthought. Furthermore, the courts are inclined to treat the obtaining of a conveyance, even from a married woman, by duress or coercion, or without her fully understanding her act, as at worst but a scheme of fraud not making it absolutely void, but merely as conferring upon her a right to obtain relief therefrom in equity, or in some other appropriate legal proceeding; and it is a principle of equity jurisprudence that where the equities of the defendant equal those of the plaintiff, the latter cannot obtain relief. If, however, a person relying upon an acknowledgment has notice of the facts on account of which relief against it is sought, it may be avoided as against him, and therefore as against a person having notice or as against one who is not a purchaser or encumbrancer for a valuable consideration, evidence is admissible, as against a certificate of acknowledgment, to prove the falsity of any essential statement thereof, as that the acknowledgment was procured by imposition, coercion, or other fraud, or that, being a married woman, the grantor did not have explained to her, and did not understand, the contents of the writing, or did not acknowledge to the officer that she

executed it freely and voluntarily: *Lowell v. Wren*, 80 Ill. 238; *Louden v. Blythe*, 16 Pa. St. 532; 55 Am. Dec. 527; *Westbrook v. Jeffers*, 33 Tex. 86; *Herring v. White*, 6 Tex. Civ. App. 249; *Rollins v. Menager*, 22 W. Va. 461.

Burden of Proof and Weight of Evidence.—The certificate of the acknowledgment of a writing is everywhere prima facie evidence of its due execution, and, upon whatever ground it is sought to be attacked, the burden of proof must be assumed by the assailant: *Barnett v. Proskauer*, 62 Ala. 486; *Marston v. Brittenham*, 76 Ill. 611; *Hourtienne v. Schooner*, 33 Mich. 274; *Ray v. Crouch*, 10 Mo. App. 321. There is no doubt that this burden is more weighty than litigants usually have to assume from the mere fact that an issue has been formed against them. In the first place, upon principles of public policy, courts cannot permit a title which appears to be perfect by the public records to be overthrown when but lightly assailed, and, in the next place, the chief witnesses controverting a certificate of acknowledgment are usually deeply interested in the result, and in many instances, by their delay to complain promptly, have subjected their own fairness, and even their credibility, to suspicion. "As a certificate forms part of a deed—is essential to its validity—and purchasers are invited to look to and rely upon it, all will admit that the evidence impeaching it ought to be clear, convincing, and conclusive, reaching a high degree of certainty, leaving upon the mind no fair, just, doubt": *Smith v. McGuire*, 67 Ala. 34. Language similar in purport to this may be found in many of the opinions of courts of last resort, but it has generally been employed in sustaining decisions already reached in the trial court, and it would be dangerous to prescribe any test by which courts or judges must be controlled in all cases.

Corroboration of Party, whether Essential.—Where there has been an appearance before an officer for the purpose of having him take and certify an acknowledgment, most of the courts, as we have already shown, regard his certificate as conclusive, unless attacked for fraud or duress, of which the party relying upon it had notice. This leaves as proper subjects for judicial inquiry only those cases in which it is claimed that the party did not appear before the officer at all, or, at least, did not appear before him for the purpose of making or having certified any acknowledgment whatever. In such a case, it is obvious that the party whose acknowledgment has been certified is often the only person who can testify upon the question in issue, and his testimony ought not to be looked upon with suspicion from the mere fact that he is a party in interest, unless there is something in his conduct or in the other circumstances and evidence to cast suspicion upon it. In one case it was said that the certificate of the acknowledgment of a deed made and taken before a magistrate in proper form must prevail over the unsupported evidence of the grantor declaring that it was false and forged. Unfortunately, in the report of this case none of the evidence is disclosed. The decision had been in favor of the acknowledgment in the trial court, and that court might have been justified in not believing the testimony of the alleged grantor. In another case in the same state it was said: "The testimony of the grantor alone is not regarded as

sufficient to overcome the certificate of the officer certifying to such acknowledgment": Lickmon v. Harding, 65 Ill. 505; Warrick v. Hull, 102 Ill. 280. There are other cases sustaining the general proposition that a certificate of acknowledgment will not be disregarded upon the evidence of the grantor or grantors alone, though in most of them the fact of an appearance before an officer was admitted, and the only claim was, that the instrument had not been explained to the wife, or that she was coerced to its execution: Fitzgerald v. Fitzgerald, 100 Ill. 385; Biggers v. St. Louis etc. Co., 9 Mo. App. 210; Grotenkemper v. Carver, 9 Lea, 280; Smith v. Allis, 52 Wis. 337. It is difficult to conceive of a rule of evidence more cruel or unjust, or better adapted to aid a forger in reaping and retaining the fruits of his crime. Where an instrument has been forged, and the grantor personated before an officer for the purpose of procuring his certificate of acknowledgment, and the instrument has been subsequently recorded, and the original lost or destroyed, the fact of the forgery can but rarely be proved otherwise than by the testimony of the grantor. This is equally true whether the officer has joined in the fraudulent scheme or not; for all persons at all familiar with the ordinary course of conveyancing know that certificates of acknowledgment are often made by officers having slight or no evidence of the identity of the person acknowledging. The courts have, however, not only declared in general terms that the evidence should be clear, cogent, and convincing, but they have also, whenever there was any conflict in evidence, inclined very strongly in favor of the certificate: Russell v. Baptist Theological Union, 73 Ill. 337; Bailey v. Landingham, 53 Iowa, 722; Herrick v. Musgrove, 67 Iowa, 63; Riecke v. Westenhoff, 10 Mo. App. 358; Rust v. Goff, 94 Mo. 511; Phillips v. Bishop, 35 Neb. 487; Pickens v. Knisely, 29 W. Va. 1; 6 Am. St. Rep. 622; Pierce v. Feagans, 39 Fed. Rep. 587; Young v. Duvall, 109 U. S. 573. Nevertheless, in our judgment, the weight of evidence in cases of this class should not be affected by any rules peculiar to the subject, and the jury, or court acting as such, should be left to determine from all the circumstances disclosed whether or not the certificate of acknowledgment is false, and that as against such certificate the evidence of the grantor or of any interested party should be regarded as sufficient to overcome it, when such testimony produces a conviction of its truth and of the falseness of the certificate.

Competency of the Officer as a Witness.—Whether an officer who has certified to the acknowledgment of a deed shall be permitted to impeach it by his testimony is a question upon which our courts are not at all agreed. In truth, the question is not whether the officer shall be permitted to impeach his acknowledgment, but whether the party claiming that he or she did not acknowledge an instrument shall be permitted to call such officer and compel him to speak, under the sanction of his oath, though, so speaking, he may contradict his official certificate. In a case in Maryland, in which the officer certifying the acknowledgment had been called to testify, the appellate court said: "In our opinion, the testimony of Hayes, taken to contradict or impeach his certificate of Mrs. Copeland's acknowledgment of the mortgage, was not admissible. That the statements contained in the certificate under the circumstances, and as between the parties in the case, were open to contradiction by proper and competent

proof, cannot be doubted; but it does not follow that a public officer, after the performance of an act required by law, should be permitted to defeat its effect by impeaching his official certificate of the manner in which he performed it. From considerations of public policy, if from no other, he must be held an incompetent witness for such a purpose": *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597; *Highberger v. Stiffler*, 21 Md. 338; 83 Am. Dec. 593. These views accord with those of the judges in some of the other states: *Stone v. Montgomery*, 35 Miss. 83; *Allen v. Lenoire*, 53 Miss. 321; *Harkins v. Forsythe*, 11 Leigh, 306; *Hockman v. McClanahan*, 87 Va. 33. This view also appears to prevail in Kentucky. In that state, however, a county clerk or his deputy has authority to take an acknowledgment of a conveyance to himself, and where he does so, and "the issue is made as to the validity or legality of his acts in taking the acknowledgment, it is competent and highly proper for him to testify to any omission or violation of duty in taking the acknowledgment. He, being one of the parties to whom the conveyance was made, and one of the beneficiaries of the wife's acknowledgment, may show that her acknowledgment was not taken as the law directs. The fact that he was innocent in this omission of duty makes no difference, for the wife cannot convey away her right of dower unless the requirements of the statute are pursued in every particular; and that she shall be examined separately and apart from her husband is one of the requirements which is indispensable, the performance of which devolves upon the clerk taking the acknowledgment; and if he, in taking the acknowledgment for his own benefit, fails to perform said duty, he and his covenantees should not be permitted to profit by such failure, but they should be considered to have failed to get the wife's dower right by the fraud or laches of said clerk, and, for that reason, not entitled to it": *Stevenson v. Brasher*, 90 Ky. 23. If the officer certifying an acknowledgment could properly be regarded as a party thereto or as an agent of the person whose acknowledgment is claimed to have been falsely certified, then perhaps the officer and such person might justly be regarded as estopped from controverting the statements in the certificate. The officer is not, however, either such party or such agent, and we can conceive of no just reason why he may not be called as a witness and compelled under oath to state the true facts of the transaction so far as he can remember them, whether he acted under mistake, or misapprehension, or in collusion with the party to be benefited by taking the acknowledgment. This question was very thoroughly considered in the case of *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, and the conclusions reached were there thus stated: "It seems to us that it is admissible to hear the evidence of a justice who took the acknowledgment of a married woman to prove that she never did in fact appear before him to acknowledge a deed, although he has certified that she did. It is, of course, permitting him to testify to his own baseness; but though his evidence must be by court and jury viewed with suspicion, yet we think it is competent in such a case, and should be received for what it is worth, and unless supported by other facts and circumstances in the case,

it would not be regarded as sufficient to impeach his certificate. Especially do we think that in this state his evidence is competent, since even the parties in interest, with certain exceptions, are competent to testify in their own behalf." In another case it was said: "The notary, who was most conversant with the facts recited in his certificate, was of all persons the most competent to testify on that subject, whether in support or impeachment of the verity of its statements. The only rule that could possibly close his mouth as a witness would be one making his certificate absolutely conclusive, one that would preclude him or anybody else from calling in question the verity of that certificate. In the argument of the learned counsel for the plaintiff, much is said in support of the proposition that such ought to be the rule, but it having been long settled the other way, it must follow from the rule now established that the notary is as competent as any other witness to testify touching his knowledge of the facts recited in the certificate, the verity of which under that rule is a legitimate subject of inquiry, a corollary recognized in the cases cited, in nearly all of which the notary testified, sometimes in support of, and sometimes in impeachment of, his certificate, and his competency was never questioned. There was no error in admitting the testimony of the notary": *Drew v. Arnold*, 85 Mo. 128; *Mays v. Pryce*, 95 Mo. 603, 612.

WHITE v. YAWKEY.

[108 ALABAMA, 270.]

DAMAGES, MEASURE OF, IN TROVER—ENHANCED VALUE OF PROPERTY.—Where purchasers, innocent of wrongdoing, from an inadvertent trespasser, have, by the expenditure of time, labor, and money, enhanced the value of the property converted and are sued for its conversion, the measure of damages is the injury done to the plaintiff by the original conversion, and not the value of the property thus enhanced by the defendants' acts or those of their vendor. Such is not the rule if the trespass is willful, or in bad faith.

DAMAGES, MEASURE OF, FOR CUTTING TREES ON ANOTHER'S LAND.—If an action of trover is brought for the conversion of timber cut on the plaintiff's land through an inadvertent trespass, the measure of damages is the value of such timber immediately after it is severed from the land, with legal interest.

TROVER.—ACTUAL POSSESSION OF LAND on the part of its owner is not essential to support an action by him for timber severed therefrom, in the absence of adverse possession in another.

PRACTICE—IMMATERIAL PLEA, TAKING ISSUE UPON. Though it is not material that the plaintiff, in an action for cutting trees upon his land and converting them to the defendant's use, should have had the actual possession of such land at the time of the wrong, yet if the defendant tenders a plea upon this subject, and the plaintiff, without demurring, joins issue thereon, such issue is, by the pleadings, made material, and it becomes necessary for the plaintiff to establish such actual possession.

TROVER CAUSED BY MISTAKE.—It is not a defense to an action of trover for cutting and converting trees on the plaintiff's land that the defendants were rightfully engaged in cutting timber on adjoining land, and whatever they did grew out of a mistake as to the boundary line. Such a defense may, however, affect the amount of the recovery.

Trover for conversion of timber cut from the land of the appellant, Yawkey. The defendants denied the ownership of the land by the plaintiff at the time the trees were cut. Their third plea was, that the plaintiff was not in the possession of the land at the time of the conversion, and the fourth plea was to the effect that the defendants were rightfully cutting timber on land adjacent to that described in the complaint, and that if they converted any timber, it was done innocently and because of their ignorance of the boundary between the land of the plaintiff and that on which they were authorized to cut. Judgment for the plaintiff, and the defendants appealed.

M. E. Milligan, for the appellant.

J. J. Morrison, for the appellee.

271 HEAD, J. The case was tried in the lower court upon the second count of the complaint, which was in trover, and claimed damages "for the conversion of one hundred pine logs cut and taken away" from the lands of the plaintiff. The material facts are, that within a year prior to the commencement of the suit one Jack Brewer cut the pine logs from the timber lands belonging to the plaintiff, and sold them to the defendants to **272** be delivered on the banks of Pea river, where he did in fact deliver them; and that neither he nor the defendants knew at the time the cutting was done that trespasses were being committed on the plaintiff's property, this fact not having been discovered until a survey was made sometime after the acts complained of had been performed. The defendants disposed of the logs, which were worth four cents per foot, at Pea river. These facts were established by the plaintiff's witness, and in regard to them there was no dispute. With a view to mitigating the damages, the defendants offered to prove the value of the logs prior to their removal from the land, accompanying the offer with the statement to the court that they expected to prove the logs were worth materially more after being transported to and placed on the banks of Pea river than they were before such removal. The court refused to allow this proof to be made, and to the ruling an exception was duly reserved. This presents the single question of the merit to be decided upon the appeal.

It will be observed from the foregoing statement that the record makes the case of a conversion by purchasers, innocent of wrongdoing, from an inadvertent trespasser, who, by the expenditure of time, labor, and doubtless money, had enhanced the value of the pine logs, after their severance from the freehold and transformation into chattels. The effect of the ruling of the circuit court was to exclude from the jury all evidence upon the subject of value, except that confined and limited to the place of delivery to the defendants, and thereby to necessitate a verdict for the value at that place, as being the only authorized measure of damages justified by the facts of the case. If the law authorized or required the recovery to be calculated upon the basis of the lesser value, under the circumstances stated, it is obvious the ruling of the circuit court was erroneous and prejudicial to appellants. No Alabama case has been found or cited in which the question here presented has been adjudicated. In *Riddle v. Driver*, 12 Ala. 590, decided in 1847, where trover was brought for fifteen hundred bushels of coal into which the wood of the plaintiff had been transformed by the defendant, it was suggested by the court as a possibility that the jury might consider the value of the defendant's labor on the rough material in estimating ²⁷³ the damages, but no opinion was given upon the point, as no question upon the measure of damages had been made in the lower court, and hence the case did not call for an authoritative adjudication in respect of the amount of the plaintiff's recovery. No occasion seems subsequently to have arisen for a decision by this court as to the measure of damages which a plaintiff ought to recover in an action of trover against an unintentional trespasser, or his innocent vendee, where, as frequently happens when portions of the realty are severed, the value has been enhanced by the labor of the trespasser in preparing and transporting the chattels to market. Many cases, however, are to be found upon this question in the reports of other American states, and the English judges have likewise frequently considered and decided it. It would be tedious to review the numerous cases we have examined, and it is unnecessary to do so. It is sufficient to say that the modern authorities are practically unanimous in holding that the rule of just compensation for the injury sustained, which is the ideal measure of actual damages does not require the assessment, against an inadvertent trespasser, of the accession to the value of a chattel which his labor has produced, but that he is entitled to an abatement therefor from the enhanced value: *Winchester v. Craig*, 33 Mich. 205; *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426, and many authorities cited in each of those cases; 26 Am. & Eng.

Ency. of Law, 829. The same rule prevails when trover is brought against the unintentional trespasser's innocent vendee, who is treated as standing in the shoes of his vendor. Such is this case: *Bolles Wooden Ware Co. v. United States*, 106 U. S. 432; *Whitney v. Huntington*, 37 Minn. 197. It is no answer to this to say that the plaintiff might have brought detinue for the logs wherever he might have found them, short of a change of identity and thereby have recovered them in specie after their value had been enhanced. In detinue the title prevails and the question of damages is not considered. If a party aggrieved elects to bring the equitable action of trover, the assessment of damages may be so adjusted as to compensate the plaintiff for his injury, without paying him a premium or depriving an innocent party of that which he has in good faith added to the chattel: *Weymouth v. Chicago etc. Ry. Co.*, 17 Wis. 550; 84 Am. Dec. 763.

The rule is different if the trespass is willful or in bad faith: *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Parker v. Waycross etc. R. R. Co.*, 81 Ga. 395; *Heard v. James*, 49 Miss. 236; *Tuttle v. White*, 46 Mich. 485; 41 Am. Rep. 175; *Bolles Wooden Ware Co. v. United States*, 106 U. S. 432.

The authorities do not agree upon the question whether, in trover against an inadvertent trespasser, or his innocent vendee, for severed portions of the realty, the rule is to allow the value of the property in place, as if it had been purchased in situ by the defendant, at the fair market value of the district, as for instance, the value of timber standing, or for coal or ore mined, the value in place, or whether the value to be taken as the basis of recovery is that of the property converted, immediately after severance, when it became a chattel. The case of *Wood v. Morewood*, 3 Com. B. 440, which is regarded as conflicting with the earlier English cases, is the leading English, and *Forsyth v. Wells*, 41 Pa. St. 295, 80 Am. Dec. 617, subsequently criticised in that state, is one of the leading American cases, supporting the rule first stated, and they have been frequently followed. Many cases which are often cited in favor of the same rule may be distinguished by noting they were not actions of trover, or that they arose in states which have abolished forms of action, or that the decisions were made in proceedings in equity where the courts were not influenced by the technical rules governing the various common-law actions. In this state, forms of action have not been abolished, and parties must be here held to the legitimate and logical consequences of the particular action, which has been instituted.

Trover is brought for the conversion of personal property, and it would seem incongruous to say that the damages could be assessed upon the principle adopted in actions of trespass *quare clausum fregit*, when the gravamen of the complaint is essentially different. Cases can be easily perceived in which the value of the timber after severance would very inadequately compensate the owner for the trespass. This would be so when the trees were prematurely cut or were valuable for shade or fruit. Under such circumstances, he may accommodate his selection of a form of action to the necessities of ²⁷⁵ the case, and bring trespass for entering his land and severing and removing timber or trees, in which case he would recover, as actual damages, the diminished value of the land, or, to state it more definitely, the value of the tree standing and any injury to the freehold by reason of their removal: *Foote v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151; *Mitchell v. Billingsly*, 17 Ala. 391; 26 Am. & Eng. Ency. of Law, 563-566. When trover is brought, the trespass upon the land is, so to speak, waived or disregarded; and when brought for the conversion of logs or trees as chattels, under the circumstances of this case, the true rule, in our opinion, is the second above stated, according to which the value immediately after severance, with interest, furnishes the proper measure of recovery. And this holding is well sustained by authority: *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426; *Bailey v. Chicago etc. Ry. Co.*, 3 S. Dak. 531; *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *Omaha etc. Smelting Co. v. Tabor*, 13 Colo. 41; 16 Am. St. Rep. 185; *Smith v. Gonder*, 22 Ga. 353. The circuit court erred in rejecting the proffered proof.

The third plea was no answer to the complaint, and, if it had been demurred to, would doubtless have been adjudged insufficient. Actual possession of land, if thereby is meant possession *pedis*, is not required to maintain an action for the conversion of timber severed from the freehold. The legal title, which draws to it constructive possession, is, in the absence of adverse possession by another, sufficient: *Cooper v. Watson*, 73 Ala. 252. But the plaintiff took issue upon the plea, and the evidence left it a question for the jury whether the plaintiff had actual possession of the land at the time the trees were cut. Though the issue was, in law, immaterial, the parties made it material by their pleadings; so that, if plaintiff was not in actual possession, as alleged, the plea was established, and defendants were entitled to a verdict. The court, therefore, erred in refusing the first charge requested by the defendants.

The fourth plea was likewise demurrable. A mistake as to boundaries and an honest belief as to ownership would constitute no defense to the action, although it might affect the amount of recovery. There is, however, no evidence in the record that the defendants were engaged in cutting trees on adjacent lands, nor that they cut the trees, for whose conversion the suit was brought. ²⁷⁶ The cutting was done by one Brewer, who sold the logs to the defendants. In other words, the fourth plea was not proven.

Before another trial, these insufficient pleas should be eliminated by a demurrer. Cases ought not to be tried on false issues. No good reason can be seen for filing special pleas containing averments of facts that may be availed of under the general issue, and the practice of complicating and confusing a case with numerous unnecessary special pleas, upon which parties are often led, in the hurry of a trial, to take issue, to the detriment of the right of the cause, ought not to be pursued.

The court did not err in refusing the affirmative charge to the defendants. We need not comment particularly on the charge requested by the defendants, upon the measure of damages, as what we have already said upon that subject will enable the circuit court to declare properly the law on another trial.

For the error in rejecting the evidence designed to mitigate the damages, and in refusing said charge, the judgment is reversed and the cause remanded.

TROVER CAUSED BY MISTAKE—DAMAGES.—Whether the same rule of damages should be adopted in trover where property is taken by mistake, as where the taking was by design, is said to be an open question: *Note to Wright v. Bank*, 6 Am. St. Rep. 364. This question is also discussed in the note to *Tilden v. Johnson*, 36 Am. Rep. 770.

TROVER—POSSESSION, WHETHER NECESSARY.—In an action of trover, the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's, and must show not only a conversion of personal property by the defendant, but also that at the time of the conversion plaintiff had a right of property, general or special, in the chattels converted, and the possession or immediate right to the possession thereof: *Union Stock Yard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341. Trover and conversion cannot be maintained when the plaintiff has neither the right of property in, nor the right of possession to, the chattels alleged to have been converted: *Johnson-Brinkman etc. Co. v. Central Bank*, 116 Mo. 558; 88 Am. St. Rep. 615, and note, with the cases collected. See, also, the extended note to *Hostler v. Skull*, 1 Am. Dec. 585.

TRESPASS—DAMAGES FOR CUTTING TIMBER ON ANOTHER'S LAND.—In an action of trespass for an unlawful entry upon land and cutting, carrying away, and converting timber growing thereon, the injured party is entitled to recover the value of the timber when it was first severed from the land, together with ade-

quate damage for any injury done to the land in removing it: *Gaskins v. Davis*, 115 N. C. 85; 44 Am. St. Rep. 439, and extended note. The owner of trees cut from his land by a willful trespasser and by him manufactured into railroad ties and sold to an innocent purchaser, is entitled to recover from the latter the value of the property at the time of the purchase without any deduction for the increased value put upon it by the labor of the trespasser: *Powers v. Tilley*, 87 Me. 34; 47 Am. St. Rep. 304, and note. See, also, the note to *Omaha etc. Refining Co. v. Tabor*, 16 Am. St. Rep. 199.

POLLAK v. MUSCOGEE MANUFACTURING COMPANY.

[108 ALABAMA, 467.]

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—ATTEMPT TO CREATE PREFERENCES.—If an insolvent debtor about to make an assignment for the benefit of creditors, for the purpose of giving a preference, procures some of them to take out and levy attachments against him to immediately precede the filing of his assignment, and gives others certain collateral securities, such attachments and pledges may be held to constitute part of the general assignment, and cannot prevent the equal distribution of the property among all the creditors.

GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS, PURPORTING to be subject to specific attachments against the property of the assignor, does not preclude the assignees from showing that the recited attachments had no existence or validity.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS, BILL BY CREDITORS TO ENFORCE OR ENJOIN ACTS OF A SHERIFF AND OTHERS.—If an assignment has been made by an insolvent debtor for the benefit of his creditors, some of them cannot maintain a bill against alleged attachment creditors to prevent their wrongful intermeddling, nor against the sheriff to compel him to pay over the proceeds of sales under attachments, where it is not shown that the assignees may not obtain the necessary redress, nor that they have been requested to do so.

AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS DOES NOT TAKE EFFECT UNTIL its execution, so as to cut off intervening liens or securities created after the assignor's disclosure of his purpose in making the assignment, but before its actual execution.

THE INSOLVENCY OF A CORPORATION DOES NOT INGRAFT A TRUST upon its property in favor of its creditors.

Suit by the Muscogee Manufacturing Company, as a creditor of Pollak Company, a corporation, on behalf of the complainant and such other creditors of the corporation as may elect to join in the suit, and praying that certain attachments be declared to be a part of a general assignment made by Pollak Company for the benefit of creditors, that the preferences sought to be obtained by the attachments be declared void, that the attaching creditors be enjoined from intermeddling with the property, and that the sheriff, if he makes any sales thereof under the attach-

ment, should be required to account for the proceeds. It was alleged that Pollak Company, being an insolvent corporation in contemplation of making an assignment for the benefit of creditors, procured a general assignment to be drawn purporting to assign all its property, subject to specified attachment liens; that when the assignment was drawn, such liens did not exist, but that a collusive agreement had been made between the assignor and the persons named as attaching creditors to withhold the assignment until the attachments could be taken out and levied; that the attachments were issued on various dates between 8:15 and 8:17 A. M. of a designated day, and thirteen minutes later the assignment was filed for record. By an amendment to the bill, the plaintiffs alleged that if they were mistaken in alleging that the attachments were not levied before the assignment was delivered, the resolution of the corporation authorizing the making of the assignment was adopted before such levy. A demurrer was interposed by one of the attaching creditors upon several grounds, among which were, that conceding the allegations of the bill to be true, the legal title to the property was vested in the assignees, who had a complete remedy at law. The demurrer was overruled, and the defendants appealed.

Tompkins & Troy, for the appellants.

Chilton & Thorington, for the appellee.

⁴⁷⁰ HEAD, J. We think the case made by the original bill is not to be distinguished, in principle, from *Rochester v. Armour*, 92 Ala. 432. Its averments clearly implicate Pollak Company, as aider and abetter in the issuance and levy of the attachments at a time when that company, having just resolved to immediately execute the general assignment, was proceeding to do so, resulting, in a few minutes after the attachments were levied, in its actual execution and delivery. The averments connect the two acts, in fact and intent, on the parts of both debtor and attaching creditors, as one transaction, had and completed for the purpose of securing, by a lien to the attaching creditors, unlawful preferences of security over the general creditors who were to be provided for by the contemplated assignment. In such case, it is immaterial whether grounds of attachment existed or not. The statutory affidavit and bond, intended by the law for the protection of the debtor against wrongful attachments, were, in effect, waived by the debtor. Being actually made and given ⁴⁷¹ they were, under the facts admitted by the demurrer to be true, mere formalities, designed to give to the proceedings the color of bona

fide assertions of lawful remedies, while, in fact, they were intended to secure unlawful preferences. The debtor, inviting the attachments, would be afforded no redress upon the bonds, howsoever clearly it might be able to show that no ground of attachment actually existed. The attachment law was enacted for higher and better purposes, and cannot be perverted to the accomplishment of such unjust and unlawful ends. The intended security was, therefore, in legal effect, attempted to be conferred by the voluntary act of the debtor, and stands upon no higher ground than any mortgage or other form of security it might have given under the same circumstances. Under the facts averred, the attachment and levies must be held to constitute parts of the general assignment, as prayed for. And the same is true, under the facts averred in reference thereto, as to the assignment of the choses in action.

The bill, as amended, introduces, in the alternative, three distinct grounds relied upon for relief: 1. That which we have already considered; 2. That the assignment was executed before either of the attachments was issued or levied, but, by its terms, the conveyance to the assignees was made expressly subject to the liens of the attachments in favor of the persons named; and 3. That the assignment was executed after the levies, but pursuant to a resolution of the board of directors of the assignor, made prior to the issuance of the attachments, and while complainant's debt was a subsisting demand against the assignor. The resolution recited (and the bill avers the same to be true) that the Pollak Company was unable longer to carry on its business and was insolvent. The language of the first resolve, as it is set out in the assignment, a copy of which is made an exhibit to, and part of, the amended bill, is as follows: "Inasmuch as this corporation is unable to meet and pay its liabilities now due and becoming due, and is insolvent and unable longer to carry on its business (its stock in trade having been attached), that it do execute a deed of general assignment for the benefit of its creditors." The second was: "That Ignatius Pollak, the president of the corporation, be and he is hereby authorized ⁴⁷² to execute a deed of general assignment in the name of said corporation, to William K. Pelzer and Sigmund Roman, in trust for all the creditors of this company, conveying all its property of every kind and description whatsoever."

Considering the second ground of relief, the case thereby made may be thus stated: The board of directors of the debtor company, by resolution, declared its purpose to make a general assign-

ment for the benefit of its creditors, and authorized its president to execute the same to Pelzer and Roman. The president undertook to exercise this authority, but, in framing the instrument, he falsely recited therein, in substance, that Cane, McCaffrey & Co., Josiah Morris & Co., and H. B. Claflin & Co., had that day levied attachments upon the goods of the debtor; and his conveyance to the assignees of the debtor's property was made expressly subject to the liens of those attachments. The case made by this phase of the bill not only necessarily, but in express words, excludes the idea that the assignment and attachments were parts of one transaction—all constituting a general assignment—or that the case was to be influenced by any unlawful intent to create preferences on the parts of the debtor or attaching creditors. It is not a bill to annul the assignment as fraudulent, but the validity of the instrument is affirmed and sought to be enforced. The question then presented is, What is the effect, as to the rights of creditors, of an assignment, for their benefit, of all the debtor's property, subject to the liens of certain specified attachments declared in the instrument to have been levied upon the property, when, in fact, no such attachments had been issued? The assignment, so far as the rights of the assignees are concerned, must, like other conveyances, be construed, and the intention of the parties determined, according to the legal effect of its terms and any extrinsic facts to which they refer, or which legitimately bear upon them. On its face, its effect is, that the assignees took the general legal title to the goods; the three attaching creditors had liens upon them to the extent of their claims, and the sheriff a special property and possession for the purpose of enforcing the liens. But, upon extrinsic averment of a creditor, admitted by demurrer to be true, no such liens and no such special property and possession **478** in the sheriff existed. Where, then, was the possession, and where the equitable interest in the goods, subject to which the conveyance was said to be made? Does the extrinsic fact that the liens did not exist operate to invest the assignees with the entire ownership, in view of the recitals and terms of the assignment under which they take, or does it convey to them the legal title and reserve to the assignor the possession and an equitable charge upon the goods to the extent of the amount of the claims of those creditors? It seems that an affirmative answer to one or the other of these inquiries is a necessary result; for certain it is that, if the attachments had not been issued and levied, there could be no equitable interest or charge in favor of the supposed attaching creditors named in the assignment, and no possession or property

in the sheriff; and no recital or stipulation of the assignment could confer such upon them. The liens or equitable interests which the recital of the conveyance excludes from its operation, and the possession of the goods, must reside somewhere. If they did not pass to the assignees, they, of necessity, remained in the assignor. What, then, is the effect, upon the equity of the bill of either of these results? If the first is true, viz., that the entire interest passed to the assignees, it would seem that the assignment, in view of the fact that the recital and assumption therein of the existence of the liens were a mistake, would be complete in itself, enabling the assignees to reduce to possession and administer the property, requiring no intervention of equity to perfect it, or to combine it with any other simultaneous disposition; and that complainant's remedy would be against the assignees when they come to settle their trusts. If the second be true, that the legal title only passed to the assignees, the said excepted liens or equitable interests and the possession remaining in the assignor, the consequence would seem to be that the assignment was only a partial one. The exception from its operation of a substantial estate, subject to the claims of creditors, would deprive the instrument of the character of a general assignment. We are aware of no principle by which such an exception could be considered a disposition of the excepted property by the assignor, which can be tacked to, and made a part of, the conveyance, thereby converting the latter into a general assignment.

474 We are of opinion that the effect of the case stated is, that the entire property passed to the assignees, for the following reasons: That portion of the conveyance evidencing the grant is in itself a complete transfer of the entire property. The words following, to the effect that the grant is made subject to the liens of three specified attachments, is, in legal effect, but an exception from the grant, of such an equitable interest in the property as the liens mentioned create. In *Frank v. Myers*, 97 Ala. 437, we had occasion to discuss, somewhat fully, the subject of exceptions in deeds, and we there laid down the essential requisites of a valid exception. We found, in effect, that if, for any legal reason, the exception was incapable of operation, the grant of the entire property was unaffected by it. As we said there, in reference to the exception then being considered, the principle is but the complement or resultant of the other principle that a deed delivered must have effect, if possible, and be taken most strongly against him who makes it. Now, in giving practical effect and operation to the exception expressed in the present assignment, the assign-

ees must need ascertain and identify the particular attachments to which it refers, and thereby learn their scope and extent; for it is by these that the extent of the interests excepted is to be known and observed. In that investigation, they ascertain that the supposed existence of attachment liens is founded in error—that no such liens existed. The words of the exception expressed are, then, founded upon a myth; they therefore refer to nothing. If the thing which the words describe be, in truth, nothing, because of the nonexistence of the thing, there is, of course, nothing upon which the exception can operate. Here the grant is of the entire property; the mythical subtraction of nothing from it leaves the grant entire. The words of the exception are: "Subject to the lien of certain attachments levied upon it on the eighth day of January, instant, to wit, Cane, McCaffrey & Co., Josiah Morris & Co., H. B. Claflin & Co." It is not an arbitrary exception of an equitable interest to the extent of a specified sum, but of such equitable entries as find support and existence in the levies of specified attachments, the existence of which levies is essential to the existence of the interests excepted. To determine what those interests are, we ⁴⁷⁵ repeat, the assignees must look to the particular attachments. Proceeding to do so, they find that none such exist. The exception, therefore, referring to nothing, necessarily fails. To state an analogous case: Suppose the exception had been of the interest of A B in a mortgage, executed to him, at a certain time, by the assignor, when, in fact, no such mortgage had ever been executed; or, if executed, had been fully paid and discharged before the assignment. It seems clear to our minds that there would be nothing for the exception to operate upon, and that the grant would be unaffected by it.

What we have said is, at last, nothing more than a process of reasoning leading to the proposition that the parties to the instrument intended, by the clause in question, no more than to declare, what the law already implied, that the property should pass to the assignees, subject to attachment liens, if any, which rested upon it. If there were, in fact, no such liens existing, it is clear the parties did not intend that an interest equal to that they would have represented, if they had existed, should be excepted from the conveyance. The resolution adopted by the board of directors, and the assignment itself, show, unmistakably, an intention to make a general assignment, reserving nothing to the assignor. As neither the law nor the assignment reserved anything to the three specified creditors, because they did not, in fact, have the specified liens, and as the inten-

tion of the assignor was to reserve nothing to itself, the result is, that the whole passed to the assignees. The bill makes no complaint of the assignees. It seeks no relief against them for any abuse of their trust. It cannot be regarded as a bill against them for a settlement of their trust, independent of any special equity; for it is clear the trust is not ripe for settlement. As to the complaints against the sheriff for wrongful intermeddling on his part, it is not shown why the assignees may not move for the necessary redress. They have not been requested to do so, nor to relinquish their right in that behalf to the complainants. They are charged with no dereliction in the premises. There is no equity in the alleged ground of relief under consideration.

As to the third ground: We have no doubt the assignment did not take effect until its execution, so as to ⁴⁷⁰ cut off intervening liens or securities created between the assignor's declaration of its purpose to make an assignment and its actual execution; such liens or securities, according to this ground of relief, not being created under such circumstances as to blend them with, and constitute them parts of, the assignment. The resolution of the board of directors was revocable at any moment before being carried into effect, and could create no vested right in the creditors to have it carried into effect. It was not an agreement with the creditors to execute a general assignment. The cases of *John Stilletto Co. v. McConnell*, 130 Ind. 47, and *Wyeth Hardware Co. v. Standard Implement Co.*, 47 Kan. 423, properly interpreted, are not authorities to the contrary. They but state, in another form, the general rule we have recognized, that dispositions for security, made by the assignor pending the making of an assignment, under circumstances which constitute them, in substance and intent, parts of the assignment when executed, will be so treated. This court has heretofore repudiated the theory that mere insolvency of the corporation ingrafts a trust upon its property in favor of creditors: *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; ante, p. 31.

Inasmuch as two of the alternative grounds of relief are thus found to be without equity, the demurrers should have been sustained on the grounds indicated by this opinion: 3 *Brickell's Digest*, sec. 183, p. 378. An order will be here made reversing the decretal order of the chancellor, and sustaining the demurrers and remanding the cause. The bill may be amended within thirty days, with power in the chancery court, or chancellor, in vacation, to extend the time on sufficient showing.

Reversed, rendered, and remanded.

CORPORATIONS—INSOLVENCY—TRUST FUND.—An insolvent corporation does not hold its property as a trust fund for the benefit of its creditors: *Barrett v. Pollak*, 108 Ala. 390; post, p. 172, and note.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—If property is pledged and attachments are procured to be levied by an insolvent debtor in contemplation of a general assignment by him for the benefit of creditors, and in pursuance of an agreement to thereby create preferences, such attachments and pledges must be considered as part of the general scheme to make an assignment, and the property pledged and attached will be held by the assignees: *Barrett v. Pollak*, 108 Ala. 390; post, p. 172, and note.

BARRETT v. POLLAK COMPANY. CLAFLIN v. BARRETT.

[108 ALABAMA, 390.]

TRUSTS, INCONSISTENT CLAIMS AND REMEDIES.—One who sues repudiating a trust and seeking to have it declared void is not entitled to relief on the ground that the trustees have been guilty of acts of spoliation and maladministration, and that the court therefore ought to take charge of the administration of the trustees.

AN INSOLVENT CORPORATION DOES NOT HOLD ITS PROPERTY AS A TRUST FUND for the benefit of its creditors.

CORPORATIONS.—A CREDITOR OF A CORPORATION IS NOT ENTITLED to the benefit of a statute respecting pledges of its choses in action, enacted for the protection of stockholders.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—If property is pledged, and attachments are procured to be levied by an insolvent debtor in contemplation of a general assignment by him for the benefit of creditors, and in pursuance of an agreement thereby to create preferences, such attachments and pledges must be treated as part of the general scheme to make an assignment, and the validity of the assignment is preserved, and the property pledged and attached will be held by the assignees for the benefit of all creditors.

IF AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS ATTEMPTS TO MAKE UNLAWFUL PREFERENCES, they will be disregarded, and the assignment held valid.

IF AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS MADE BY THE ASSIGNOR WITH THE FRAUDULENT PURPOSE of reacquiring the ownership and possession of the property assigned, which purpose has been subsequently carried out by various acts after the assignment has been executed, the assignment is nevertheless valid, unless the assignee at the time of accepting it, or the general creditors provided for therein, knew of, or participated in, the fraudulent intent. A secret fraudulent intent on the part of an assignor cannot defeat his general assignment for the benefit of creditors.

Suit by H. W. Barrett & Co., praying the court to take possession of the assets of Pollak Company, a corporation, and administer them for the benefit of creditors, to declare void a deed of assignment, and to appoint a receiver, and for general relief. The same facts were alleged as in the preceding case, and further, that one of the assignees had sued out an attachment against the Pollak

Company for rents due, and his interests as an attaching creditor were adverse to the interests represented by him as assignee; that the corporation was insolvent when it made the assignment, and its assets then became a trust fund for the benefit of its creditors; that by the attachments unlawful preferences were contemplated, and the sheriff was about to sell the property attached, and to consummate such preferences, that the assignees Pelzer and Roman had aided and abetted the scheme to create unlawful preferences, and were therefore unfit to act as such assignees; that the pledging of the property as security was void, because not made with the consent of a majority of the stockholders of the insolvent corporation. Motions to dismiss the bill for want of equity having been interposed and overruled, the defendants appealed.

Troy & Watts, for H. W. Barrett & Co.

Tompkins & Troy, contra.

395 HEAD, J. In Pollak Co. v. Muscogee Mfg. Co., 108 Ala. 467, ante, p. 165, we practically settled the controlling questions presented by these appeals. In that case, the purpose, in one phase of the bill, was to have three specified attachments, and the levies thereof, upon goods of Pollak Company, a corporation, alleged to have been invited and procured by the debtor itself, and certain pledges of choses in action made by the debtor to two of those attaching creditors declared parts of a general assignment executed by a debtor shortly afterward, and, in another phase, to have the attached property administered as a trust fund for the benefit of creditors—the trust character arising, as contended, from the insolvency of the debtor corporation. Like that, the present bill, which is filed by a creditor of the same corporation, in one of its phases seeks to have the property of the corporation distributed to all its creditors as a trust fund of the same character, and, in another phase, unlike the other bill, seeks to annul both the attachments and the assignment as fraudulent and void, and have the property administered by a receiver of the court's appointment. The pledges of choses in action are sought to be invalidated for nonconformity, by the corporation, to the provisions of subdivision 7 of section 1664 of the code of 1886, requiring a certain consent of stockholders, manifested in a prescribed way, to authorize a pledge of its property by a corporation. There are, in the amendments to the bill, many averments of fraud and collusion on the part of the assignors, the assignees, the sheriff, and the attaching creditors, all of whom are parties to the bill; but they all relate to the administration of the property subse-

quent to the levies of the attachments and the execution of the assignment. They are acts of spoliation and maladministration committed by these persons, which it would ³⁹⁶ be within the province of a court of equity to redress, at the suit of a creditor who establishes by his bill and proof an equity to have the court take charge of the administration of these trustees, or to set aside the trust entirely, by reason of fraud in its creation, or other vitiating circumstances annulling it, or, affirming the validity of the trust, to set the assignee aside for unfitness or maladministration subsequent to their creation. We have seen that the complainants' standing in court, if they have any, rests upon the averments that the attachments and assignment, in respect of the property levied upon or assigned, are vitiated by fraud, or that the property was a trust fund for creditors which rendered the attachments and assignment ineffectual to impair the rights of complainants, and, as to the choses in action pledged, that the pledges are invalid by reason of nonconformity to the statute aforesaid. If there is no equity in either of these alleged grounds of relief, the court will not take cognizance of the alleged acts of maladministration occurring subsequent to the creation of the trusts, for the reason that the complainants have not by their bill given themselves a standing in court by which they can invoke the exercise of that jurisdiction. Repudiating the trusts, and failing to sustain that position, they must need go out of court.

As to the trust character of the property of the corporation, by reason of its insolvency, we settled that question, in an exhaustive and unanswerable opinion by Justice McClellan, in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, ante, p. 31, and followed that case in *Pollak Co. v. Muscogee Mfg. Co.*, 108 Ala. 467, ante, p. 165, repudiating the trust fund doctrine. There are some explanations contained in the separate opinion of Justice Coleman in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, ante, p. 31, which were not passed upon by the other members of the court.

As to the pledges of choses in action, the statute relied upon (Code of 1886, sec. 1664, subd. 7) was enacted for the protection of stockholders, and a creditor cannot invoke it: *Nelson v. Hubbard*, 96 Ala. 238, and cases therein cited at page 253, particularly; *Beecher v. Marquette etc. Rolling Mill Co.*, 45 Mich. 103, which we quoted and approved. There is no equity, therefore, in this ground of relief.

³⁹⁷ In *Pollak Co. v. Muscogee Mfg. Co.*, 108 Ala. 467, ante, p. 165, we ruled, upon substantially the same averments of facts in reference thereto as are averred in the present bill, that the is-

suance and levies of the attachments were mere forms resorted to by the attaching creditors, and the debtor for the purpose of giving to those creditors unlawful preferences of security over the general creditors, who were to be provided for by the contemplated general assignment, which was executed a few minutes afterward, and that they were and must be treated as parts of the general assignment. That being their effect, the statute (Code of 1886, sec. 1737) merely annuls the preferences, preserving the validity of the assignment as a trust for all the creditors; and it makes no difference that the preference was attempted to be created with an actually fraudulent intent: *Holt v. Bancroft*, 30 Ala. 193; *Danner v. Brewer*, 69 Ala. 191; *Rochester v. Armour*, 92 Ala. 433; *Preston v. Spaulding*, 120 Ill. 208; therein quoted and approved. It is by the mandate of the statute that the unlawful preference is to be merged, so to speak, in the assignment. Suppose the preference had been attempted to be created by the terms of the assignment itself, it is manifest no extent of actually fraudulent intention inciting its creation would, in view of the statute, annul the entire assignment. The only purpose of the parties was to create a preference. In the very nature of fraud, that purpose was necessarily fraudulent, actually or constructively, for the reason that it designed to violate the law, to the injury of the general creditors. The validity of the assignment not being assailed for any other cause, it results that there is no equity in any of the grounds of relief set forth in the bill.

In discussing the validity of the general assignment in respect of the charge of fraud, we do not overlook the fact that the last amendment filed alleges that said Ignatius Pollak (who under the averments of the bill was essentially the corporation itself) not only did the acts of conversion and maladministration after the assignment was executed, which are charged against him and others in the bill, with the fraudulent intent and purpose of reacquiring ownership and possession of the goods in the manner he is alleged to have acquired the same, but that he, the said Pollak, also procured the issuance and ³⁰⁸ levy of the attachments, and executed the general assignment to Pelzer and Roman, with the same fraudulent intent and purpose; and we think it cannot be doubted that this allegation, admitted to be true, would have stamped both the attachments and general assignment as fraudulent and void, and given the bill equity for the relief it seeks, if it had been further averred that the assignees, at the time they accepted the assignment, or the general creditors, provided for by the assignment, knew of, or participated in, that fraudulent in-

tent. But it is the rule in this state that the secret fraudulent intent of the assignor in making a general assignment for creditors, unknown to the assignee at the time they accept the trust and to the creditors, does not authorize one of the creditors to set aside the assignment for fraud: *Truss v. Davidson*, 90 Ala. 359. This is the way we understand the averments of the bill.

The motions to dismiss the bill for want of equity ought to have been sustained. We deem it unnecessary to consider the rulings of the court upon the demurrers to the bill; for whether well or ill taken, there was no harmful error in sustaining them, since the bill ought to have been dismissed for want of equity. As we cannot say, however, that the bill may not be amended so as to give it equity for the relief it seeks, and give the complainants a standing in court, to have the said alleged subsequent acts of maladministration investigated and corrected, we remark that we do not consider the bill, if so amended, multifarious, nor is it necessary that it be sworn to. The decree, on the appeal of complainants will be affirmed, and on the appeal of respondents will be reversed and a decree here rendered dismissing the bill for want of equity, unless within thirty days it shall be so amended as to give it equity, with power in the chancery court, or chancellor in vacation, to extend the time on sufficient showing. The cause will be remanded.

Reversed, rendered, and remanded.

CORPORATIONS—INSOLVENCY—TRUST FUNDS.—The insolvency of a corporation does not ingraft a trust upon its property in favor of its creditors: *Pollak v. Muscogee Mfg. Co.*, 108 Ala. 467; ante, p. 165; *First Nat. Bank v. Dovetail Body etc. Co.*, 143 Ind. 550; 52 Am. St. Rep. 435.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—UNLAWFUL PREFERENCES.—This subject will be found fully treated in the extended notes to *Benham v. Ham*, 34 Am. St. Rep. 856; *Crawford v. Taylor*, 26 Am. Dec. 584; and the note to *Moody v. Carroll*, 10 Am. St. Rep. 739.

AN ASSIGNMENT FOR THE BENEFIT OF creditors, containing a trust for the assignor himself, is void: *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57, and note. Reservations to the debtor render void assignments for the benefit of creditors, unless they are consistent with the object of the deed: *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806, and note; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259, and note.

McCURRY v. GIBSON.

[108 ALABAMA, 451.]

WHILE CONTRACTS IN GENERAL RESTRAINT OF TRADE are against public policy and void, those in partial restraint, if founded upon a valuable consideration and reasonable in their operation, are valid.

A CONTRACT IN RESTRAINT OF TRADE IS REASONABLE if it offers only a fair protection to the interests of the party in whose favor it is made, without being so large in its operation as to interfere with the interests of the public.

TRADE, RESTRAINT OF.—THE CONTRACTS OF PROFESSIONAL MEN, SUCH AS PHYSICIANS, not to practice their profession in competition with others pursuing the same calling in a particular place and for a time designated, are valid.

TRADE, RESTRAINT OF.—AN INJUNCTION may issue to compel a physician to comply with his agreement not to practice his profession in a designated place.

TRADE, CONSIDERATION FOR AGREEMENT IN RESTRAINT OF.—The purchase by one party of the property and goodwill of the business of another furnishes a sufficient consideration for an agreement of the latter not to compete in the conduct of the business so purchased.

TRADE, RESTRAINT OF.—THE ADEQUACY OF THE CONSIDERATION for a contract not to pursue a calling in a designated place will not be considered by a court called upon to enforce such contract.

DAMAGES, WHEN LIQUIDATED.—If one agrees not to practice his calling in a designated place, and that if he does so he will pay a sum designated as a forfeiture, such sum is to be deemed liquidated damages, rather than as a penalty.

INJUNCTION—LIQUIDATED DAMAGES.—Though a party who has agreed not to practice his profession at a designated place stipulates in case he does so to pay a sum specified as a forfeiture, and such sum has by the court been deemed to be liquidated damages, the court is not thereby ousted of its jurisdiction to enjoin a further violation of the agreement. This is especially true where the circumstances show that the contracting parties were not anticipating a violation of the agreement when it was made.

PLEADING NEGATIVING A LAWFUL CONTRACT.—Where the facts necessary to entitle a party to relief are stated, illegality is not presumed, and, if it exists, should be pleaded as a defense in the answer. A person suing to enjoin the violation of a contract not to practice medicine as a competitor need not, therefore, allege that he was authorized or licensed to practice in the place covered by the contract.

TRADE, CONTRACTS IN RESTRAINT OF.—It is not sufficient answer to a suit to enjoin a violation of a contract not to practice medicine in competition with the complainant that when the contract was entered into, he was not authorized to practice in the place designated therein.

PRACTICE IN EQUITY.—A DEMURRER TO AN ANSWER is unknown to the equity practice. Hence the objection may be made at any stage of the proceedings that new matter pleaded in such answer fails to disclose sufficient matter to bar relief.

AN INJUNCTION WILL NOT BE ISSUED to enjoin the violation of an agreement not to engage in business in competition

with the complainant, unless it appears that he is engaged in the business, and that it is of some substantial value, nor if in carrying on the business, he must violate some law.

PLEADING—ATTEMPT TO SHOW THAT PLAINTIFF IS ENGAGED IN AN ILLEGAL BUSINESS.—If a defendant, against whom an injunction is sought to prevent his practicing his profession as a physician in the same place with the complainant, relies upon the defense that the latter is illegally practicing his profession, the defendant must show facts from which this conclusion must necessarily follow. It is not sufficient to state that the complainant did not file a certificate of his qualification in the county, if, under some circumstances, such filing is unnecessary.

Matthews & Whiteside, for the appellant.

R. B. Kelly, contra.

⁴⁵³ **HEAD, J.** The bill was filed on the 30th day of May, 1893, to enjoin the breach of a contract, which the defendant made with the complainant in January of the same year. A preliminary injunction was granted at the institution of the suit, which the city court, upon defendant's motion for a dissolution, refused to dissolve, and upon final hearing it was continued in force, according to the prayer of the bill. From the final decree the appeal is prosecuted by the defendant, the assignments of error being based upon the overruling of a demurrer to the bill, and a motion to dismiss for want of equity, and upon the final decree awarding the complainant relief. The bill in its amended form, stripped of repetition and redundancy, and appropriately condensed, contains the following allegations: 1. That on the third day of January, 1893, the complainant, "who is also a practicing physician" (to quote the exact language of the bill) purchased from the defendant, who "was and had been prior thereto engaged in the practice of his profession as a physician, in the city of Anniston, Alabama," for the consideration of one hundred and twenty-five dollars, his horse, buggy, and medical practice, the vendor agreeing in writing, as a part of the contract, not to practice his profession in that city for two years, and making the further stipulation that in case of failure to comply with the agreement he would pay to the complainant, "as a forfeiture, the sum of two hundred dollars"; 2. That the defendant, in disregard of his agreement, continued to practice medicine in Anniston, was then holding himself out for practice, and was serving ⁴⁵⁴ all who desired his services; that he had refused to pay the stipulated sum mentioned in the contract, and was insolvent; 3. That when the contract with defendant was made, the complainant, upon the faith of the same, as defendant well knew, formed a partnership with one J. B. Simpson, another physician, for the practice of

medicine in Anniston, and, as such partners, they entered into the practice there, moving their office to one formerly occupied by the defendant, who left the city; 4. That the complainant and said Simpson (each being equally interested in any practice done by the other) were then engaged in the pursuit of their profession, when the bill was filed, although, in pursuance of an arrangement between themselves, complainant was temporarily absent from Anniston a part of the time, he at no time having abandoned the practice, in that place, and he, or his partner, having, during the whole period, been engaged in the practice in said city; 6. That in consequence of the re-entry of the defendant into the practice of medicine in Anniston, the income of himself and partner had diminished about one-third; 7. That the complainant elects to insist upon a compliance, upon the part of the defendant, with his contract to refrain from practicing his profession in said city, for the stipulated time, and he agrees, in case the preliminary injunction be made final, not to sue defendant for damages for a breach of the contract, nor seek to enforce a payment of the sum of two hundred dollars, or any other amount.

The demurrer assigned twelve grounds of objection to the bill, but all of them may be embraced and treated within the following classification: 1. That the contract alleged was void as being violative of public policy, and in unreasonable restraint of the practice of a learned profession; 2. That the contract expressed no adequate consideration; 3. That the bill showed complainant had an adequate remedy at law; 4. That it is not alleged that on January 3, 1893, the complainant had license to practice medicine in Alabama, nor in Calhoun county, nor in the city of Anniston; ⁴⁵⁵ nor that he was able, competent, or authorized, under the law, to supply the city of Anniston with the accommodations the defendant obligated himself not to supply, for the two years covered by the contract, or to make the said contract.

The essential averments of the bill were either admitted by the defendant in his answer or testimony, or satisfactorily established by other proof; and most of the questions that have been argued may be resolved by a consideration of the ruling upon the demurrer. The other points urged upon us for a reversal of the decree of the city court will be noticed when we come to refer to other matters of defense set up, or undertaken to be brought forward by the answer.

The questions of law raised by the demurrer have, for the most part, been so often the subject of judicial decision in this country and in England that in respect of them, but little room is left for

argument. It is well-settled law that while contracts in general restraint of trade are against public policy and void, yet those in partial restraint, founded upon a valuable consideration, and reasonable in their operation, are valid and binding: 3 Am. & Eng. Ency. of Law, 882, and cases cited in 10 Am. & Eng. Ency. of Law, 943. The test which is laid down by which it may be determined whether a contract is reasonable is, whether it affords only a fair protection to the interests of the party in whose favor it is made, without being so large in its operation as to interfere with the interests of the public: *Homer v. Granes*, 7 Bing. 735, 743; and this test has been uniformly followed in subsequent cases: *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; *Brewer v. Marshall*, 19 N. J. Eq. 547; 97 Am. Dec. 679; *Chappel v. Brockway*, 21 Wend. 157. A partial restraint is that which is restricted in its operation in respect to place; and this may be made in express terms, or it may result from a construction of the contract when viewed in the light of the environments and circumstances surrounding the contracting parties: *Moore etc. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23. It is very frequently the case that such contracts, like that made in the present instance, contain a limit as to time also, but there is a distinction between a general restriction as to place and one as to time, it being now well settled that an agreement not to engage in a certain business, in a stated place, or within a reasonably limited territory, is not rendered invalid by a ⁴⁵⁶ failure to specify any limit of time for its duration: *Carll v. Snyder* (N. J. Eq., July 13, 1893), 26 Atl. Rep. 977; *French v. Parker* (R. I., May 17, 1888), 14 Atl. Rep. 870; *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64, and the numerous authorities cited in each of these cases. Contracts by professional men, such as physicians, surgeons, dentists, and lawyers, when coming within the rules stated, not to practice their professions in competition with another pursuing the same calling, have time and again been enforced; and no distinction is made between their contracts and those of tradesmen. The suggestion that while valid in a court of law, the agreement of a person not to pursue a profession involving the exercise of skill and learning will not be specifically performed in equity is not tenable. The doubt expressed in an early English case has long since been resolved in favor of the jurisdiction of the chancery court; and numerous instances are to be found of its exercise when invoked to restrain, by injunction, the breach of a valid contract not to practice law or medicine in competition with the complaining party. As we are dealing with a

case between physicians, we will cite a few of the cases directly in point: *Cole v. Edwards* (Iowa, Jan. 24, 1895), 61 N. W. Rep. 940; *McClurg's Appeal*, 58 Pa. St. 51; *Dwight v. Hamilton*, 113 Mass. 175; *Butler v. Burleson*, 16 Vt. 176; *Timmerman v. Dever*, 52 Mich. 34; 50 Am. Rep. 240; *Doty v. Martin*, 32 Mich. 462; *Wilkinson v. Colley*, 164 Pa. St. 35.

It is settled by the authorities that the purchase by one party of the property and goodwill of the business of another furnishes a sufficient consideration for an agreement by the latter, in enhancement of the value of the goodwill, not to compete with him in the conduct of the business. The rule is the same when a physician sells his property and practice to a professional brother. It was at an early day supposed that the consideration in such cases must be adequate; that is, equal in value to the restraint imposed; but this idea has been exploded ever since the decision in *Hitchcock v. Coker*, 6 Ad. & E. 438, which has been repeatedly approved and followed; and in which Chief Justice Tindal said: "If by adequacy of consideration more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he places himself, we feel ourselves bound to differ ⁴⁵⁷ from that doctrine. A duty would thereby be imposed upon the court in every particular case which it has no means whatever to execute. It is impossible for the court to say whether, in any particular case, the party restrained has made an improvident bargain or not." In a note to *Angier v. Webber*, 92 Am. Dec. 748, 754, many authorities to the same effect are collected. We may add that the same doctrine upon the subject of adequacy of consideration obtains generally in cases of specific performance, and it is now recognized by the leading text-writers as the modern and more reasonable rule, as we declared in *South etc. R. R. Co. v. Highland Avenue etc. R. R. Co.*, 98 Ala. 400; 39 Am. St. Rep. 74. The written contract exhibited with the bill showed upon its face a sufficient consideration, and the court will not assume the task of ascertaining whether the defendant made a good or a bad bargain. It is not infrequently the case that contracts in restraint of trade contain provisions for the payment to the parties for whose benefit they are made of a stipulated sum in case of a breach by the other contracting party. The language of such agreements varies widely, as we find from an examination of the cases. Sometimes the sum is called a "penalty," sometimes "liquidated damages," and in still other instances, a "forfeiture," the latter being the word used in the contract between the parties

to this controversy. Courts have not always agreed in their views upon the question whether such stated sums were to be treated as penalties or liquidated damages, although the current of authorities is to treat the sum named as liquidated damages, rather than a penalty: *Keeble v. Keeble*, 85 Ala. 552; *Ropes v. Upton*, 125 Mass. 258; *Holbrook v. Tobey*, 66 Me. 410; 22 Am. Rep. 581; and authorities cited therein. The word is not decisive of the character of the stipulation. We need not repeat the rules which have been adopted for the determination of the question, and which are only different in their application. Upon the authority of the cases cited, and others upon which they are based, we are of opinion that the contract averred in the bill contained a valid agreement for the payment of two hundred dollars as liquidated damages for its breach; and it is out of this fact that the supposed adequacy of the legal remedy ousting the equitable jurisdiction is thought to grow. There are some cases, decided by ⁴⁵⁸ courts of last resort, which so hold: *Hahn v. Concordia Soc.*, 42 Md. 460; *Martin v. Murphy*, 129 Ind. 464; and we have been cited to like decisions by courts of inferior jurisdiction in New York. Such, however, is not the rule adopted by the New York court of appeals, nor is it supported by the weight of authority. We have recently declared that such a provision for liquidated damages was no bar to a decree for specific performance in a case otherwise sufficient, and we are satisfied the decision was correct: *Morris v. Lagerfelt*, 103 Ala. 609. No one doubts that the parties might stipulate for the payment of a sum which, upon a proper construction of the contract, would be deemed a price paid for the privilege of resuming business by the party theretofore restrained. Such was the nature of the agreement construed in *Dills v. Doebler*, 62 Conn. 366; 36 Am. St. Rep. 345; by which it was provided that the party sought to be restrained should be "at liberty to practice dentistry in said Hartford at any time after the termination of this contract by paying to said Dills one thousand dollars"; and, in that case, it was held that the insolvency of the defendant would not suffice to give jurisdiction to enjoin his resumption of practice until he paid the stipulated sum, which evidently was not designed to prevent a breach of the contract to refrain from practicing, but was in truth the price of the privilege of again pursuing his calling in the city of Hartford. Of the rule we adopt,, *Cooley, C. J.* in *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, used the following language: "This is perfectly reasonable and equitable, for the penalty, forfeiture, or fixed damages are only

agreed upon to render it more improbable that the act against which they are directed will be committed." The same thought, but with more elaboration, was expressed by the court of appeals in *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; and we quote from the opinion an accurate statement of the law, as exactly applicable to this case: "It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention, in that case, would be manifest that the payment of the penalty should be the price of nonperformance, and to be accepted by the covenantee in lieu of performance: *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400-405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appears that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced." All that is settled by the insertion of a simple agreement to pay liquidated damages; so that if an action is brought for damages, the recovery shall be for the amount named, neither more nor less: *Long v. Bowring*, 33 Beav. 585. No doubt can be entertained in this case that the parties were not contemplating a breach of the contract, nor a return by the defendant to the practice of medicine in Anniston. He was on the eve of departure to another state, which he expected to make his future home, and had decided and declared that he would no longer practice in said city. The stipulation to which we have adverted is no barrier in the way of granting complainant relief by injunction, which is a negative specific performance of the contract: *Dooley v. Watson*, 1 Gray, 414; *Howard v. Woodward*, 10 Jur., N. S., 1123; *Fox v. Seard*, 33 Beav. 327; 2 High on Injunctions, sec. 1175. The complainant had his election to sue for damages, or to have the agreement performed, according to its terms.

The various grounds of demurrer which we have consolidated under the fourth head of the foregoing classification were directed to the failure of the bill to allege that complainant was authorized to practice medicine in Anniston, where the contract was made. The bill did not aver that complainant was practicing at that time, and it will hardly be contended that it was necessary to show that a physician is actually practicing before he can contract

for the property and goodwill of another. The bill not alleging that complainant was practicing when the contract was made, and it being unnecessary to so allege, it must be obvious that it was likewise unnecessary to make the allegations upon the subject of license and compliance with the law suggested by the demurrer. If a failure by the complainant to comply with legal requirements necessary to constitute him an authorized ⁴⁶⁰ practitioner, if he was practicing when the contract was made or even when the bill was filed, constituted any reason why he should not have relief against the defendant, an appropriate method of presenting the defense is by plea or answer. It is a familiar rule that a complainant must allege every fact essential to his right to relief; at the same time, illegality is not presumed, and when the facts alleged are sufficient to entitle a party to relief, and no illegality or unlawful conduct is shown upon the face of the bill, the pleading is sufficient; and if there be such illegality as will defeat the suit, the defendant must bring it forward by plea or answer: *Nelms v. Edinburg etc. Mortgage Co.*, 92 Ala. 157, and authorities cited. What we have said will suffice to explain the ground of our opinion that the city court committed no error in overruling the demurrer.

The bill was very full and complete in its averments, containing some even that were unnecessary. It contained equity, and the motion to dismiss was properly overruled.

The answer, in view, no doubt, of the rule of pleading above stated, undertakes to defend against the bill, by making allegations which were doubtless designed to show, and which it is argued do show: 1. That when the contract was made the complainant had not procured a city license, in accordance with the ordinances of Anniston, to entitle him to practice there, and that he was not, at that time, authorized, under the laws of the state, to practice in Calhoun county; and 2. That when the bill was filed, complainant was practicing, in that county, in violation of law. From these premises the legal conclusion is drawn by counsel for appellant that the contract was void in its inception; and furthermore that the bill cannot be maintained, since it was filed, they say, in aid and protection of the practice which complainant was carrying on in violation of the laws of the state.

These are the questions which have been earnestly pressed upon us for a reversal of the decree, and to decide them correctly will require an examination of the averments of the answer and the evidence in the case bearing thereon. It is sufficiently averred and proven that to authorize one to practice medicine in Annis-

ton, on January 3, 1893, a license was required, and that ⁴⁶¹ complainant had not taken out a city license at that time. It does not clearly appear from the evidence that he had then begun his professional career in that place, but it may be conceded that such was the case. There was no law requiring any license to make the contract we have under consideration. It was not unlawful, nor was any violation of law necessary to its execution. It does not appear that any infraction of the law was contemplated in the making of it. It was not void. A short time after it was made, the city license was taken out, and it is not contended that when the aid of the court was sought, the complainant was violating any law or ordinance of the city of Anniston. We cannot, therefore, deny relief for anything growing out of the omission of the complainant to have a city license when the contract was made.

We have only now to consider the last question which has been insisted upon, and it grows out of the averment of the answer wherein it is alleged that complainant had not, up to the time of the answer, filed a certificate, issued by any medical board in the state of Alabama, with the probate judge of Calhoun county, to be registered by said probate judge, so as to entitle him to practice medicine in Calhoun county. No matter what may be the rule in a court of law, in an action for a breach of contract, it is everywhere asserted that the ground of the jurisdiction in equity to enjoin a violation of a valid contract, in restraint of competition, is the difficulty, not to say impossibility, of computing the actual damages which the complaining party may sustain by the loss of business he might otherwise procure. If the complainant were not engaged in business, or interested therein, it is obvious he could suffer no injury by a resumption of business by the covenantor. For these reasons, it was held in *Berger v. Armstrong*, 41 Iowa, 447, that a bill filed for an injunction in a case of this character was wholly insufficient, if it did not show that the complainant was himself, when the injunction was applied for, engaged in the business which the defendant had agreed not to carry on in a town of that state. Thus it is that the business, or some substantial interest therein, is an essential part of the case to be made by the bill. From these premises, it is argued, and with great force, that since it is necessary to call to complainant's ⁴⁶² aid, in making out his case, the practice of his profession, or some substantial interest therein, a court of equity will repel him, if he is violating the law, in the very practice he seeks to protect. The law, out of no consideration for a defendant, but

from a resolution to maintain its own supremacy, will not aid a plaintiff or complainant to recover for injury to an unlawful business: *Smith v. Dinkelspiel*, 91 Ala. 528. The illegality of the complainant's business, whether conducted by himself, or conjointly with his partner, not appearing by his pleadings or proofs, it must be set up by the defendant, and the averments, whether contained in a plea or answer, must be sufficient in their statement of facts to show the illegality: *Wilde v. Wilde*, 37 Neb. 891. The only averments of the answer upon the subject of the status of complainant's business when the bill was filed is that quoted above. It asserts simply, in substance, that complainant had not filed a certificate—doubtless meaning a certificate of qualification—with the probate judge of Calhoun county, and the evidence goes no further than this extent. Does this show a violation of the law? If an indictment against the complainant contained no more than this, would it not be subject to demurrer or motion to quash? If the defendant had brought forward the defense by a plea containing only that averment, would it have been adjudged valid, if set down for hearing upon its sufficiency? A demurrer to an answer is unknown to chancery practice, and if the answer, setting up new matter, fails to contain sufficient matter to bar relief, the defendant alone must bear the consequence of the imperfect manner in which he puts forward his defense: *Salmon v. Clagett*, 3 Bland, 141. We are compelled to say that, whatever the real facts may have been, we cannot conclude from anything contained in the answer, or even from the evidence, that complainant was illegally practicing medicine in Anniston, which is situated in Calhoun county, where he instituted his suit. The act of February 18, 1891, amendatory of section 4078 of the Criminal Code (Acts 1890-91, p. 857), prohibits the practicing of medicine or surgery in the state without having first obtained a certificate of qualification from one of the authorized boards of medical examiners of this state, with a proviso ⁴⁶³ excepting from its operation physicians then practicing in the state who were graduates of a respectable medical college, and had complied with the law by having their diplomas recorded by the judge of probate in the county in which they were practicing, and also physicians who had practiced in this state for five years. An indictment under this act, making the charge in the language of the main cause, would be good without negating that the defendant came within the exceptions contained in the proviso: *Bell v. State*, 104 Ala. 79. Under this act, there is no authority to practice under a license, and

hence an indictment for practicing without a license is no longer good: *Nelson v. State*, 97 Ala. 79. If the answer had alleged that the complainant was practicing medicine in Calhoun county without having obtained a certificate of qualification from one of the authorized boards of medical examiners of this state, it would have made a *prima facie* case of illegal practicing, which he would have been forced to meet, either by bringing himself within the proviso, or by proving that he had the proper certificate of qualification (*Porter v. State*, 58 Ala. 66), and that it had been recorded in the office of the probate judge in the county where he resided when it was issued: Code of 1886, sec. 1306. Until recorded, it cannot be said to be complete, nor to possess any efficacy of an authority to practice medicine: *Nicholson v. State*, 100 Ala. 132. Construing the averments of the answer most strongly against the pleader, it must be held that complainant had procured a certificate of qualification, which he had not recorded in Calhoun county. It was not averred that the complainant resided in Calhoun county when the certificate was issued to him, and it was not necessary to record it there unless such was the case. Non constat, but that he procured it in another county where he then resided, and it had been there recorded. In the absence of a sufficient answer, defendant was put to no proof on this subject. The attempted defense has not been maintained.

There is no error in the record, and the decree is affirmed.

CONTRACTS IN RESTRAINT OF TRADE—WHEN REASONABLE.—The validity of contracts in restraint of trade depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness in contracts of this kind is the test of validity: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784, and note. See, also, the extended notes to *Smalley v. Greene*, 35 Am. Rep. 269, and *Tardy v. Creasy*, 59 Am. Rep. 686.

CONTRACTS IN RESTRAINT OF TRADE—INJUNCTIONS.—A covenant by a practicing physician not to engage at any time thereafter in the practice of medicine or surgery in a certain city is valid, and a court of equity will grant an injunction to restrain its violation: *French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733, and note. But see *Dills v. Doebler*, 62 Conn. 366; 27 Am. St. Rep. 345, and note.

DAMAGES—WHEN LIQUIDATED AND WHEN A PENALTY. When a lump sum is named by the parties to a contract as compensation for a loss suffered, the presumption is that the sum named is intended as a penalty and not as liquidated damages, no matter what it is called in the contract: Note to *Monmouth Park Assn. v. Wallis Iron Works*, 39 Am. St. Rep. 636. When from the nature of a contract the damages cannot be calculated with any degree of certainty, a stipulated sum will usually be held to be liquidated damages when so designated in the contract: *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267, and note.

KREBS MANUFACTURING COMPANY v. BROWN.

[108 ALABAMA, 508.]

DAMAGES, WHEN ARE NOT REMOTE AND SPECULATIVE.—If one undertaking to put a window in a storehouse in first-class order does his work so negligently and unskillfully that the rain comes in through the window, damaging articles stored in the house, he is liable for the injury thus occasioned. It is the direct and proximate result of his default.

PLEADING DEFECTS IN WORKMANSHIP.—An allegation that a party who had undertaken to put a window in a house did so in a negligent and unskillful manner, and, on account of his so doing, the rain came through the window where it was connected with the house, and damaged certain property (describing it), sufficiently designates the respects in which the work was defective.

COUNTERCLAIM ARISES OUT OF SUBJECT MATTER WHEN.—If in an action to recover for putting a window in a house, the defendant pleads the negligent manner in which the work was done by the plaintiff, and alleges resulting damages, this constitutes a claim arising out of the subject matter of the suit.

THE MEASURE OF DAMAGES for property injured is generally the difference between its value before and after the injury.

PRACTICE.—TO ALLOW LEADING QUESTIONS is within the discretion of the trial court.

PRACTICE ON APPEAL.—If a bill of exceptions does not purport to set out all the evidence, the appellate court cannot reverse the finding of the trial court.

B. C. Jones, for the appellant.

509 **HEAD, J.** According to the plea, the plaintiff contracted with the defendant to put in, for the latter, a window in a storehouse occupied by defendant, at the price of twenty-six dollars. The window was to be put in, in first-class order and workmanship in every way, but, as the plea alleges, the plaintiff did the work in a negligent and unskillful manner, and, on account of the work being done so poorly, the rain came in through the window, where the same was connected to the house, and damaged certain specified articles of property belonging to the defendant, to the extent of twenty-six dollars and twenty-five cents, which sum defendant offers to recoup from the demand of the plaintiff, who sues to recover the contract price of the work. It is objected, by demurrer to the plea, that the damages claimed are remote and speculative, and not the natural consequence of any act of the plaintiff. A storehouse is a house for the storage of goods. It was natural, and to be expected, that defendant would keep goods stored therein. If, by reason of the negligent and improper manner in which the window was put in, the rain blew in and injured **510** goods therein stored, such injury was the direct and proximate result of the plaintiff's default; and the amount or extent, in money, of such injury, is easily capable of exact ascer-

tainment: *Culver v. Hill*, 68 Ala. 66; 44 Am. Rep. 134. It is also demurred that the plea fails to set out wherein the work was defective. We think the averment that by reason of the negligent, unskillful, and poor manner of doing the work, the rain came in through the window where the same was connected to the house, is sufficient to inform the plaintiff wherein the work was defective. The plea sufficiently shows that the work was not done in accordance with the contract. It was not necessary that the plaintiff should have guaranteed the window against leakage. It is also demurred that the damages claimed by the plea do not arise out of the subject matter of the suit. This ground is manifestly not well taken: *Culver v. Hill*, 68 Ala. 66; 44 Am. Rep. 134. These are all the grounds of demurrer necessary to notice. They were properly overruled by the court.

When defendant, Brown, was on the stand as a witness in his own behalf, he was handed a list of the goods claimed to have been damaged, which were set out in the plea, and the following question was asked: "State whether or not that is a correct list of the goods damaged and their values, and if the amount thus shown is the correct amount of damages to the goods." The plaintiff objected to the question, and, his objection being overruled, he excepted. The witness answered that "it was a correct list of the goods damaged, and that as they were rendered worthless by the wetting received, the value as laid down in the plea was the correct amount that they were damaged." The measure of damages for injury to property is, generally, the difference between its value before and after the injury; and it is not, generally, proper to ask a witness to state the amount of the damage: *Young v. Cureton*, 87 Ala. 727. But, in the present instance, the witness testified that the goods were rendered worthless by the wetting they received, in view of which there was, in the examination of the witness, no room for the application of this rule. There being, in the judgment of the witness, no value after the injury, there was no such difference, as above mentioned, to be ascertained; and, consequently, the testimony of the witness that the damage amounted to the full value ⁵¹¹ of the goods was not objectionable. Such was the necessary and legal sequence of the fact that the goods were worthless after the injury and by reason of it. We think that part of the question which called upon the witness to state if the list exhibited to him was a correct list of the goods damaged and their values, if it had appeared that the contents of the list had been made known to the court, was no more than a violation of the rule against leading questions. In

such case, it would have been the same, in effect, if the counsel had read to the witness, from the list, the articles therein mentioned, and their values, and asked him if they were the goods that were injured, and their values; or if he had, without the aid of the list, stated the articles and their value, and asked if they were correct. To allow leading questions is within the discretion of the trial court, and not revisable here. But it nowhere appears that the court was ever informed what was on the list, and the evidence in response to the question could in no wise have injured the appellant.

The bill of exceptions does not purport to set out all the evidence, and we cannot revise the finding of the court on the facts. We will presume there was sufficient evidence to justify the finding.

There is no error in the record, and the judgment is affirmed.

IN THE CASE of *Garrett v. Sewell*, 108 Ala. 521, the question was presented whether the wrongful removal of a fence built for the purpose of protecting crops from the depredation of stock subjected the wrongdoer to liability for such injuries as thereafter resulted from such depredation. The question was answered in the affirmative, the court saying: "This fence was there, and the plaintiff according to the verdict of the jury had a right to have it remain there, for the sole purpose of protecting her fields and crops from the incursions and depredations of livestock. Its wrongful removal defeated this sole object of its existence, and was the direct cause of the depredations sought to be proved, and these the immediate, not remote, uncertain, and speculative, consequences of the wrong. The court erred to the plaintiff's prejudice in the exclusion of this testimony."

DAMAGES—PROXIMATE CAUSE.—To sustain an action, the damages to be recovered must be the natural and proximate consequence of the act or omission complained of: *Patch v. Covington*, 17 B. Mon. 722; 66 Am. Dec. 186, and note; *Clark v. Pacific R. R.*, 39 Mo. 184; 90 Am. Dec. 458; *Earp v. Cummins*, 54 Pa. St. 394; 93 Am. Dec. 718. This subject will be found fully treated in the extended notes to *Forney v. Geldmacher*, 42 Am. Rep. 390, *Brown v. Chicago etc. Ry. Co.*, 41 Am. Rep. 53, and *Lehigh Valley R. R. Co. v. McKeen*, 35 Am. Rep. 649.

DAMAGES—MEASURE OF, WHERE PROPERTY IS INJURED. The measure of damages recoverable for the destruction of shade trees on the plaintiff's premises is the difference between the value of such premises before and after such destruction: *Evans v. Keystone Gas Co.*, 148 N. Y. 112; 51 Am. St. Rep. 681, and note.

SETOFF—BREACH OF CONTRACT.—A breach of contract, though it also involves a tort, may be used as a setoff: *Becker v. Northway*, 44 Minn. 61; 20 Am. St. Rep. 543.

TRIALS.—WHETHER LEADING QUESTIONS shall be permitted rests very much in the discretion of the court, and rulings in respect to them are not the subject of exceptions, unless there has been an improper exercise of such discretion: *Forath v. State*, 90 Wis. 527; 48 Am. St. Rep. 954, and note. See, also, the extended note to *Turney v. State*, 47 Am. Dec. 84.

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CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

STATE MUTUAL FIRE INSURANCE ASSOCIATION v.
BRINKLEY STAVE & HEADING COMPANY.

[61 ARKANSAS 1.]

INSURANCE, PLACE WHERE DEEMED EFFECTED.— If a person in this state makes application for insurance to the agent of an insurance corporation whose domicile is in another state, and the application is forwarded to such corporation at its home office, and is there passed upon and accepted, and the policy there signed by the proper officers is forwarded directly to the assured in this state, who thereafter forwarded the premiums to the insurer at its home office, it having no agent in this state authorized to pass upon applications or to issue policies, the contract is not a contract of this state, but of the state wherein the policy was signed and issued, and, if valid there, it is valid here.

FOREIGN CORPORATIONS, CONTRACT OF, WHEN NOT VOID.— Though foreign corporations doing business in the state, except after complying with certain regulations designated in statutes, are subjected to certain penalties, and they and their agents are guilty of a misdemeanor, a contract of insurance effected by them is not void.

INSURANCE, RIGHT OF INSURED TO CANCEL AND HAVE UNEARNED PREMIUMS RETURNED.— An insured in a mutual insurance corporation, who is entitled by the terms of his policy to terminate the insurance at any time and to withdraw from the corporation by notice in writing to the secretary on paying all dues, is not at once entitled to unearned premiums on giving notice of his desire to cancel the insurance and to withdraw. The corporation may wait until the anniversary of the policy, if necessary, to enable it to determine for what proportion of the expenses and liabilities the assured is chargeable up to the date of such notice.

H. A. & J. R. Parker, for the appellant.

C. F. Greenlee, for the appellee.

* HUGHES, J. The plaintiff (appellant), a mutual fire insurance company incorporated under the laws of the state of

Illinois, sued the defendant (appellee) for an assessment of two hundred and twenty-five dollars for dues, losses, and liabilities incurred as a member of plaintiff company on two policies. The defendant denied the liability, set up that the policies were canceled, that plaintiff owed it one hundred and twenty-five dollars for unearned premiums, and that plaintiff's contract on policies was void for noncompliance with the foreign corporation law, and prayed judgment for one hundred and twenty-five dollars on counterclaim.

The court found the facts to be: 1. That the insurance for which the policy was issued was solicited in the state by an agent of the plaintiff during the course of regular business herein, and that the application was made and the policy was accepted in this state; 2. That plaintiff is a foreign corporation, and has wholly failed to comply with any of the laws of this state regulating insurance, and was not entitled to transact insurance business in this state; 3. That the insurance was, on the 26th of May, 1891, terminated, and defendant, on its cross-complaint, is entitled to recover from plaintiff one hundred and twenty-five dollars unearned premiums.

The court declared the law to be: 1. No foreign corporation shall do any business in this state, except while it maintains therein one or more known places of business, and an authorized agent in the same upon whom process may be served, and they shall exercise no greater powers, nor have any greater privileges, than ⁴ are exercised or had by like corporations of this state; 2. Before mutual fire insurance companies are permitted to do business in this state, it is required that they shall give bond to the state of Arkansas for the use of the beneficiaries of the policy holders of such companies, with security to be approved by the secretary of state, in the sum of twenty thousand dollars, conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, which bond shall be filed in the office of the secretary of state, and the law requires insurance corporations doing business on the assessment plan to make return to the auditor of state annually, on or before the 1st of March, a statement of the affairs of the corporation for the year ending on the 31st of December next preceding; 3. Plaintiff was not entitled to do insurance business in this state until it had complied with act 84 of the acts of Arkansas for 1887, and received from the auditor of state a certificate to that effect; and if any person transacted any insurance business for plaintiff, until it had complied with the requirements of said act, he was guilty of a misdemeanor, and subject to a fine in the sum of five hun-

dred dollars; 4. Plaintiff cannot recover in this action unless it has complied with section 3832 of Mansfield's Digest, and paid the taxes therein prescribed; 5. If plaintiff has wholly failed to comply with its duties, as prescribed in sections 3833 and 3834 of Mansfield's Digest, and the act of Arkansas above-mentioned, and the insurance was obtained from defendant company, and the same was solicited by an agent of plaintiff while in the course of regular business in this state, then plaintiff cannot recover in this action; 6. If defendant company or its agents requested the termination of the insurance, it is entitled to recover from the plaintiff the amount of unearned premium proved by the evidence; 7. Where an act is prohibited by ⁵ statute, a contract to do the act is illegal and unenforceable; and, where a statute pronounces a penalty for an act, a contract founded on such act is void.

The appellee made application to the agent of the appellant at Brinkley, Arkansas, for two policies of insurance in the appellant company. The applications were forwarded to the company at Chicago, Illinois, and there passed upon, accepted, dated, and signed by the proper officers of said company, which was a mutual fire insurance company, chartered under the laws of Illinois, with its domicile at the city of Chicago in said state. The policies were then sent by the company directly to the appellee at Brinkley, Arkansas, and the premiums were thereupon forwarded to the appellant company at Chicago.

It appears that the agent to solicit insurance for the appellant had no authority to pass upon applications to bind his company or to issue policies; nor were the policies, when issued, sent to him for delivery, or the premiums paid to him to be forwarded to his company. These contracts, for the reasons stated, were not Arkansas contracts, but Illinois contracts.

When the applications of the appellee had been received, passed upon, and accepted, and the policies of insurance had been dated and signed at Chicago, and then mailed to the appellee, the contracts were then and there complete, and were Illinois contracts, and governed by the laws of that state: 2 Parsons on Contracts, 712; 2 Kent's Commentaries, 12th ed., 477; and note; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; McIntyre v. Parks, 3 Met. 207.

Though the appellant company failed to comply with the statute in not doing those things required of foreign corporations before doing business in this state, ⁶ the contracts in this case were not void on that account, as they are Illinois contracts.

It is also contended that these policies are void because the appellant company failed to comply with the statute in regard to "foreign insurance companies and agents therefor," found in Sandels and Hill's Digest, from section 4137 to section 4139 inclusive; and particularly because section 4138 says that "any person or persons, or corporation, receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or corporation not of this state, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the school fund of the state the sum of five hundred dollars for each month or fraction thereof during which such illegal business was transacted; and any company not of this state, doing business without authority, shall forfeit a like sum for every month or fraction thereof, and be prohibited from doing business in this state, until such fines are fully paid; and every such person, or persons, or corporation, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than five hundred dollars."

It will be observed that, though penalties are imposed in this act upon the persons or corporations doing the things therein prohibited without first complying with its requirements, it does not make void the contracts made by the insurance companies without such compliance, either as the corporations named therein, or the policy holders in such companies.

In Toledo etc. Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, it is stated—correctly, as we think—by the supreme court of appeals of West Virginia that "a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do ⁷ business in another state will not on that account be held absolutely void, unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others": See cases cited in that opinion.

The insurance contracts in this case were not void on account of the failure of the insurance company to comply with the statutory prerequisites to the right of a foreign insurance company to do business in this state. The penalty imposed by the statute was exclusive of any other forfeiture: Washburn Mill Co. v. Bartlett, 3 N. D. 138; 2 Morawetz on Corporations, sec. 665.

There was a provision in these policies of insurance (sec. 8) that "this insurance may be terminated at any time at the request of the assured, in which cases the association shall retain

only the customary short rates for the time the policy has been in force."

The defendant contends that, before the expiration of the first year for which it had paid premiums, to-wit, in May, 1891, and before the commencement of this suit, it requested the cancellation of its policies of insurance, and the return of the unearned premiums, amounting to one hundred and twenty-five dollars, which amount the defendant claimed was due it, and for which it demanded judgment. It contended that its request for cancellation terminated its liability for any assessment thereafter made, and left the company indebted to it for unearned premiums, and says the company refused to cancel the policies or pay the unearned premiums till the maturity or anniversary of the policies. There was proof tending to support this contention.

The company maintains that, before it could ascertain the amount due the appellee for unearned premiums, ⁸ it would have had to await the expiration of the year, or the anniversary of the policy, that it might be able to determine for what proportion of the expenses and liabilities, in proportion to appellee's insurance, up to the date of the request for cancellation, the appellee would be liable, and it does not appear that there was any offer by appellee to meet these in any way; but it seems that the appellee claimed that it was entitled at once to the unearned premiums at the date of its request for cancellation of its policies, without provision for, or recognition of, any obligation to bear its legitimate proportion of the liabilities of the association of which the appellant was a full member, according to the charter of the said association.

The ninth section of the charter of the appellant company provides that "any member of this company may withdraw therefrom by notice in writing to the secretary and paying all dues and liabilities." If there were dues or liabilities which the appellee was liable to pay to the company, he was entitled to recover the unearned premiums, less the amount of his dues and liabilities to the association, but not until these could be ascertained, and the balance of the unearned premiums became due and payable according to the charter and by-laws of the association, to which the appellee subscribed when it became a member of the association.

It is apparent from what has been stated herein that the circuit court in its first finding of facts erred, and that in its third finding it stated only what was conceived to be the legal effect of the evidence, and not the evidence itself. The declarations

of law made by the court are inapplicable to this case, and erroneous. The court, it seems, tried the case upon a wrong theory.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

INSURANCE—PLACE WHERE DEEMED EFFECTED.—If an insurance corporation, organized and doing business in this state, solicits insurance in another and there receives an application and a premium note which is dated at its home office, to which the note and application are sent and from which a policy issues, the contract is deemed to be made here, and is controlled by the laws of this and not by the laws of the state where the property is situated: *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584; 39 Am. St. Rep. 316, and note. To the same effect see *Seamans v. Knapp-Stout etc. Co.*, 89 Wis. 171; 46 Am. St. Rep. 825, and note.

INSURANCE CORPORATIONS MAY, IN THE STATES WHEREIN THEY ARE CREATED, INSURE PROPERTY SITUATE IN ANOTHER STATE by whose laws they are forbidden to insure therein; whereas if the contract were entered into in the latter state it would be void: *Seamans v. Knapp-Stout etc. Co.*, 89 Wis. 171; 46 Am. St. Rep. 825, and note; but on this point see especially, *Rose v. Kimberly*, 89 Wis. 544; 46 Am. St. Rep. 855, in which case it was held that a foreign insurance corporation could not maintain an action on a policy of insurance on property situated in Wisconsin without first complying with the requirements of a statute of that state regulating the business of such corporations.

BURLINGTON INSURANCE COMPANY v. LOWERY.

[61 ARKANSAS, 108.]

INSURANCE—LOSS, NOTICE OF.—If an insured, upon the destruction of his property from the peril insured against, notifies the local agent of the insurer, with the request that such agent notify his principal, and the request is complied with, this is a sufficient notice of the loss.

INSURANCE.—NOTICE OF LOSS IS IMMEDIATE within the meaning of a policy of insurance stipulating for immediate notice when it is given to an agent of the insurer a day or so after the loss occurs, with a request that he notify his principal, and he at once complies with such request.

INSURANCE, WAIVER OF PROOFS OF LOSS.—If an insurance corporation sends a blank form of proofs of loss after the expiration of the time within which such proof was required by the policy to be made, and thereafter receives without objection the proofs made upon such blank, it waives the failure to make such proof in time.

INSURANCE, ORAL WAIVERS WHERE WRITTEN ARE STIPULATED FOR.—Proof of loss may be waived orally, though the policy requires waivers to be in writing.

INSURANCE—VACANT AND UNOCCUPIED PREMISES, WHAT ARE NOT.—The fact that a tenant, intending to remove, goes away to meet his wife, leaving two of his children in the house, with instructions to remain there until he returns, and that

a small portion of the furniture has been removed, does not constitute a breach of a condition against the premises becoming vacant and unoccupied.

INSURANCE PAYABLE TO MORTGAGEE, ACTION BY MORTGAGOR.—If an insurance is effected on property, loss, if any, payable to the mortgagee, he is a necessary party to an action on the policy, though the interest of the mortgagee is less than the amount of the insurance.

Action upon a policy of insurance against loss by fire. The defenses were, failure to give notice of the loss, failure to make the proofs of loss designated by the policy, vacancy of the house when it was destroyed, mortgaging the property after the policy issued, and that the action could not be maintained in the name of the plaintiff, he having mortgaged the property, and the policy being by its terms payable to the Jarvis-Conklin Mortgage Company. The policy was issued by John J. Sumpter & Son, general agents of the insurer, and the notice of the loss was given to them within a day or two after it occurred, with the request that they notify their principal, which they at once did in writing. The proof of loss was not made until about thirty days after it occurred, but, after the expiration of such time, the insurer sent a special agent to examine into the loss, and, after he had done so, sent a blank to the assured upon which to make his proof of loss. He having used it for that purpose and forwarded it to the insurer, it was returned to him for correction, and, after being corrected, was again sent to and returned by the insurer. The insured property consisted of a house occupied by a tenant. He had made arrangements to move to another place, and had gone to another town to meet his wife, leaving his two children in the house with instructions to remain until his return. They did so, but a man employed for that purpose had moved a small part of the tenant's furniture. Before the balance was removed and before the tenant's return and while his property remained in the house, both the furniture and the house were destroyed by fire. Before the policy issued, the property had been mortgaged, and, in consequence, the policy had a mortgage clause therein as follows: "Loss, if any, payable to the Jarvis-Conklin Mortgage Company or its assigns."

Clayton & Brizzolara, for the appellant.

E. W. Rector, for the appellee.

113 HUGHES, J. The notice of loss given by John J. Sumpter at the instance of the assured was acknowledged by the company to have been received, and was sufficient. Notice by a local agent of the company, upon information communicated to him

by the assured, is sufficient: *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; 80 Am. Dec. 573; *Wood on Insurance*, 2d ed., 938, 939.

Notice in four days has been held "immediate," and the policy of insurance in this case required immediate notice of loss: *Hoffecker v. New Castle etc. Ins. Co.*, 5 Houst. 101.

By its action in sending to the appellee a blank form for proof of loss after the thirty days in which proof was to be made, and receiving the proof when made, without objection, so far as appears from the proof, the company waived the failure to make proof within the thirty days, and cannot be heard now to object on that account. "Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, upon which the party has relied and acted." The company is estopped from enforcing the forfeiture: *Insurance Co. v. Eggleston*, 96 U. S. 572; *German Ins. Co. v. Gibson*, 53 Ark. 494; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532.

Proof of loss may be waived by parol, though policy requires it to be in writing: *Insurance Co. v. Eggleston*, 96 U. S. 572; *German Ins. Co. v. Gibson*, 53 Ark. 494; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532.

The temporary absence of the tenant at the time of the fire did not work a forfeiture, the policy having provided that if the house was allowed to become unoccupied, ¹¹⁴ the policy should be forfeited: *May on Insurance*, secs. 248, 249 d; *Wood on Fire Insurance*, sec. 91, p. 215.

Was it competent for the appellee to maintain this action alone? We think not. The policy provides that the loss, if any, shall be paid to the *Jarvis-Conklin Mortgage Company*, absolutely; not as its interests may appear, as is frequently provided in such cases, but the whole amount of the loss is made payable to it. The policy is, in effect, assigned to it, and the legal title is in it.

It, therefore, or its assignee, is the party entitled to sue and recover for the loss on this policy. While the mortgage company is entitled to sue and recover the entire loss, the assured (the appellee) may properly be made a party to protect his interest in the policy.

If the policy had been made payable to the mortgagee as its interest might appear, and it did not appear that its interest was greater or as great as the loss, the assured would be the proper party to sue; but if the policy is payable absolutely to the mort-

gagee, then the assured can sue only with the express consent of the mortgagee (*Coates v. Pennsylvania Fire Ins. Co.*, 58 Md. 172; 42 Am. Rep. 327); unless the assured had paid or extinguished the mortgage debt before suit: *Baltis v. Dobin*, 67 Barb. 507; 2 May on Insurance, sec. 449; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516.

The policy of insurance in this case is for one thousand dollars; the mortgage on the property is for five hundred dollars, as shown by the proof in the case; and it is apparent that the assured has an interest to the extent of the surplus, after the mortgage debt shall have been satisfied.

The judgment is reversed, and the cause is remanded, with leave to the appellee to make the holder of the mortgage a party, and for a new trial.

Battle, J., absent.

INSURANCE—NOTICE OF LOSS.—Notice by parol to an agent of an insurance company is of no effect, where the charter contains a condition requiring notice of the loss to be given in writing to the secretary or one of the directors: *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; 80 Am. Dec. 197.

INSURANCE—FORTHWITH STATEMENT OF LOSS.—A condition in a fire insurance policy that notice of loss must be given "forthwith" means that it must be given without unnecessary delay or with reasonable diligence under the circumstances of each particular case: *Note to Harnden v. Milwaukee etc. Ins. Co.*, 49 Am. St. Rep. 471.

INSURANCE—ORAL WAIVER OF CONDITIONS.—Parol evidence is admissible to show waiver by acts in pais of an insurer, notwithstanding a stipulation in the policy that nothing less than an express agreement indorsed on the policy shall be construed as a waiver of any of its conditions or restrictions: *McFarland v. Kittanning Ins. Co.*, 134 Pa. St. 590; 19 Am. St. Rep. 723, and note. When a policy of insurance declares that there can be no waiver except in writing indorsed on the policy, the mode enters into and becomes a part of the power, and waiver cannot be made, except in the manner in the contract provided: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216, and extended note at page 234.

INSURANCE—VACANT PREMISES.—To constitute occupancy of a dwelling-house within the meaning of a fire insurance policy, it need not be used continuously. The family may be absent for health, pleasure, business, or convenience for reasonable periods: *Moody v. Insurance Co.*, 52 Ohio St. 12; 49 Am. St. Rep. 699, and note.

SETER v. WILLIAMS.

[61 ARKANSAS, 189.]

CREDITOR'S BILL, PREFERENCE GAINED BY.—If a creditor files his bill to set aside an assignment for fraud, carrying on the contest successfully and at his own expense, another creditor cannot then intervene and compel the sharing with him of the property recovered. The creditor who first files his bill obtains thereby a priority entitling him to be paid out of the proceeds of the assets, if there are no valid prior liens.

CREDITOR'S BILL—CREDITORS BECOMING PARTIES AFTER A DECISION.—A creditor who delays asking to be admitted as a complainant until the cause has been finally heard and a finding has been made in favor of the original complainant, and the alleged fraudulent conveyance directed to be set aside, will not be admitted as a party, but his claim will be postponed until the complainant's claim has been satisfied.

A FRAUDULENT TRANSFER PASSES NOTHING AS AGAINST CREDITORS, though good between the parties.

VENDOR'S RIGHT TO RENTS.—One who has sold land and taken notes for the purchase price, which he has assigned, is not entitled to rents, although he retains the legal title to the lands so sold, and if he becomes insolvent and his estate goes into the hands of a receiver, neither the latter, nor the general creditors whom he represents, are entitled to such rents.

PARTIES.—PURCHASERS OF LANDS AND PARTIES HOLDING NOTES FOR THE PURCHASE PRICE under an assignment from the vendor are necessary parties to a proceeding to determine who is entitled to rents accruing from such lands, and such rents, if collected by the receiver, cannot be distributed in the absence of those parties.

Suit by Virginia J. Williams, in behalf of herself and all other creditors of Baird & Caruth, praying for the appointment of a receiver of the property of that firm, they having made a general assignment for the benefit of their creditors, and, their assignee having been unable to give a bond, other creditors filed a cross-complaint in the nature of a creditors' bill in behalf of themselves and such other creditors as might wish to join them, praying that the assignment be declared fraudulent and void because the assignor had intentionally withheld a part of his property. On the hearing of the bill, the assignment was adjudged fraudulent, and set aside, and the property directed to be distributed among the creditors filing or adopting such cross-complaint. After the entry of this decree and before the distribution of the fund, other creditors intervened and asked to be allowed to share in the distribution. They also claimed that as security for their indebtedness Baird & Caruth had transferred to them a note executed by one Phillips and secured by a mortgage, and that the receiver had collected rents on the mortgaged land, and that such moneys should go to such mortgagees, that other parts of the land had been sold and notes taken for the purchase price, and

transferred as security, and that rents had been collected from these lands. The right to intervene was denied as against the parties who applied after the original assignment had been adjudged to be fraudulent, and they appealed.

Rose, Hemingway & Rose, and J. H. Arnold, for the appellants.

J. W. House, J. D. Conway, and W. S. Eakin, for the appellees.

¹⁹³ HUGHES, J. Though it is the favorite policy of a court of equity to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by the court: *McDermutt v. Strong*, 4 Johns. Ch. 687. Here the appellees, to whom the reward of diligence was granted, filed their bill to set aside the assignment for fraud, and succeeded. The appellants contented themselves with standing by and seeing the appellees carry on the contest at their own labor and expense. This seems to come within the maxim, "*Vigilantibus, non dormientibus, jura subveniunt.*" "The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid out of the proceeds of the assets, if ¹⁹⁴ there are no valid prior liens": *Clark v. Figgins*, 31 W. Va. 157; 13 Am. St. Rep. 860, and cases there cited.

Section 577 of Beach on Modern Equity Practice, lays down the rule as follows: "A creditor, who delays asking to be admitted as a complainant until after the case has been finally heard, should be admitted, unless his admission is by consent, only on condition that those who have expended their labor and incurred the risk of trying the case be first paid." In the case of *Smith v. Craft*, 11 Biss. 340, Judge Gresham maintained that, "after the announcement of the finding of the court in favor of the complainants attacking the fraudulent preference, if other creditors come in and ask to be made parties to the suit as cocomplainants, this may be done, but their claims will be postponed in favor of the original complainants." "It is clear that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien, and are entitled to priority over other creditors at large": *Wallace v. Treacle*, 27 Gratt. 487.

The intervening creditors here obtained judgments on their claims at the April term of the circuit court for 1893, and caused executions to be issued thereon and placed in the hands of the sheriff of the county, and they were held by the sheriff at the time

of the final decree in this cause. They thus obtained liens on all the assigned property, subject to be seized on execution, and they thereby obtained priority over Senter & Co., who did not obtain judgment till the October term of court next thereafter.

A fraudulent conveyance, though good between the parties, passes nothing as against creditors: 2 Bump on Fraudulent Conveyances, 465; Freeman on Judgments, 350, 394; Stix *v.* Chaytor, 55 Ark. 116; McNeill *v.* Carter, 57 Ark. 579.

When the law gives priority, equity will follow it: Codwise *v.* Gelston, 10 Johns. 522; Wiswall *v.* Sampson, ¹⁹⁵ 14 How. 67; Wormser *v.* Merchants' Nat. Bank, 49 Ark. 117; Wallace *v.* Treake, 27 Gratt. 487.

"When a bill is filed by judgment creditors, in behalf of all judgment creditors, to reach property which could not be effectively reached at law, as in suits against an administrator to reach assets fraudulently conveyed by the deceased in his lifetime, and where the statute provides that the assets in the hands of the administrator shall be held subject to the payment of debts in the order prescribed by statute, . . . it is well settled that no preference can be obtained by filing a creditor's bill first. Upon the death of a person, his estate is at once charged with the payment of all debts, to be paid under the statute, according to class, *pro rata*": Clark *v.* Shelton, 16 Ark. 474; Jackson *v.* McNabb, 39 Ark. 117; 2 Story's Equity Jurisprudence, sec. 890. Thompson *v.* Brown, 4 Johns. Ch. 620. Several cases of the kind last mentioned are cited by counsel for the appellant, but they are not applicable to the case at bar.

The complaint to set aside the assignment for fraud in this case was brought by the intervenors named therein as plaintiffs, and in behalf of all other creditors of the assignors who might wish to join therein. The appellants did not propose to become parties, or to intervene, until after final decree setting aside the assignment as fraudulent, and ordering the assets distributed to the original complainants in the bill to set aside the assignment. They were, therefore, properly refused the privilege of sharing *pro rata* in the distribution of the assets uncovered by the suit of the original intervenors without their assistance. There is no error in the court's decree on this ground.

We are of opinion that, upon the offer of Senter & Co. to intervene and contest the distribution of the rents of lands, which had been sold by Baird & Caruth ¹⁹⁶ before the assignment, and for which they had made bonds for title, and the purchase money notes for which they had assigned to Senter & Co., the purchas-

ers of these lands, and Senter & Co. should have been made parties, that their respective equities might be determined by the court. It is apparent that neither Baird & Caruth, nor Ware, the assignee, had interest in these lands, as they were sold by Baird & Caruth before the assignment, and the notes for the purchase money had been assigned by Baird & Caruth, before the assignment, to Senter & Co. After they were sold by Baird & Caruth, they held merely the legal title in trust, to be conveyed to the purchasers when the purchase money should be paid. When the notes for the purchase money were assigned to Senter & Co., they became thereby entitled to the vendor's lien for the payment of the notes. It is clear, therefore, that the equities as to those lands were between the purchasers and Senter & Co. It was not equity to distribute these rents to Baird & Caruth's general creditors. This part of the decree is reversed, with directions that the purchasers of these lands be made parties. Otherwise the decree is affirmed.

CREDITOR'S SUIT.—Equity will allow a creditor who has failed to present and prove his demand, before the day appointed in the order calling in creditors, to come in with his claim at any time before the actual distribution of the assets, upon his contributing his fair proportion of the expenses of the suit, but the creditor is not entitled to protection if he is guilty of laches in filing his petition: *Ex parte Nayler*, 11 Rich. Eq. 259; 78 Am. Dec. 457. A judgment creditor first taking his bill to reach property not subject to execution at law obtains a preference: *Corning v. White*, 2 Paige, 567; 22 Am. Dec. 659, and note.

FRAUDULENT CONVEYANCES ARE NO CONVEYANCES against those to be defrauded, though good between the parties: *Johnson v. Harvy*, 2 Penr. & W. 82; 21 Am. Dec. 426; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578, and note. A sale made to hinder, delay, or defraud creditors is as to them absolutely void, and not voidable merely: *Mason v. Vestal*, 88 Cal. 396; 22 Am. St. Rep. 310, and note; but see *Bradfeldt v. Cooke*, 27 Or. 194; 50 Am. St. Rep. 701.

BRISCOE v. ALFREY.

[61 ARKANSAS, 196.]

ACCIDENT, LIABILITY FOR.—No one is liable for an inevitable accident. Hence, if the statute makes the owner of every animal of a designated class running at large liable for a specified penalty, and also for all damages done by it, he is not liable if he keeps it in a strong inclosure, out of which it breaks in the night without his knowledge, and thereafter kills another animal belonging to the plaintiff in the action.

ANIMALS, CARE TO BE EXERCISED OVER.—Though a statute imposes a penalty on the owner of every stallion over two years of age found running at large, and makes him liable for all

damages done by it, he is not required to exercise more care to prevent its escape than a prudent man would exercise under similar circumstances to prevent animals of the kind mentioned from running at large, taking into consideration their natural habits and propensities, and is, therefore, not liable if it escapes from his control while he is so in the exercise of such care, and inflicts injury before he knows of its escape.

Action to recover damages. The action was based upon a provision of the statute of the state in the following language: "If any seed horse, or any unaltered mule or jack, over the age of two years, be found running at large, the owner shall be fined, for the first offense, three dollars, and for every subsequent offense not exceeding ten dollars, to be recovered by civil action in the name of any person who shall sue therefor, one-half to his own use and the other to the use of the county; and the owner shall also be liable for all damages that may be sustained by the running at large of any such seed horse, jack, or mule." The animal which inflicted the injury had been kept by the defendant in a strong stable surrounded by a strong fence, but had broken out in the night-time without the defendant's knowledge. Judgment for the defendant, and the plaintiff appealed.

N. W. Norton, for the appellant.

M. T. Sanders, for the appellee.

¹⁹⁸ WOOD, J. The statute does not place owners of the animals named beyond the protection of that universal rule which exempts men from liability for inevitable accidents. This is plain when all the provisions of the section quoted are considered together. It is not to be supposed that the legislature demanded an impossibility, and imposed a penalty for inability to avoid the inevitable. No human prescience could forestall the various contingencies of escape to which such animals are liable. Yet if the unfortunate owner is to be held responsible at all hazards, the anomalous result would be to inflict upon him a penalty for something which might be impossible for him to avoid.

The ownership of the animals named is not forbidden, but expressly recognized, and the imposition of such burdens as would tend, directly or indirectly, to prevent or discourage the ownership and use of such animals was never contemplated. By the somewhat rigorous results to follow to the owner in case of his failure to use proper care in restraining the animals designated, the legislature evidently only designed to ¹⁹⁹ enforce upon him the strict observance of that ancient maxim, "*Sic utere tuo ut alienum non laedas.*" What degree of care is required? Only that which a prudent man under similar circumstances would ex-

ercise to prevent animals of the kind mentioned from running at large, taking into consideration their natural habits and propensities. It is the intentional or negligent permission of the owner for his animal to run at large which subjects him to the civil and penal consequences prescribed by the statute. Whether the owner has exercised such care as the law requires, if the facts are disputed, is a question for the jury. The following authorities are cited to support the views we have expressed: Bishop on Non-Contract Law, sec. 1220 et seq.; Wolf v. Nicholson, 1 Ind. App. 222; McBride v. Hicklin, 124 Ind. 499; Rutter v. Henry, 46 Ohio St. 272; Leavenworth etc. Ry. Co. v. Forbes, 37 Kan. 448; Fallon v. O'Brien, 12 R. I. 518; 34 Am. Rep. 713; Presnall v. Raley (Tex. Civ. App., June 6, 1894), 27 S. W. Rep. 200; Klenberg v. Russell, 125 Ind. 531; McIlvaine v. Lantz, 100 Pa. St. 586; 45 Am. Rep. 400—all cited by appellee's counsel.

Counsel for appellant has called our attention to statutes and decisions of other states in which the owners of dogs are made liable absolutely for damages done by them. The status of the dog before the law is *sui generis*: Bishop on Non-Contract Law, sec. 1233. The vicious dog in general, and the odious sheep killer in particular (to which several of the cases cited refer), are under the law's especial condemnation. Without entering upon a discussion of the reasons therefor, it suffices to say that no legislation or decision with reference to injuries by dogs do we regard as analogous to that of the other purely domestic animals of the kind enumerated in our statute.

The instructions of the trial court were in accord with this opinion, and there was no error in its ruling admitting certain testimony to which objection was made. Its judgment is therefore affirmed.

ACCIDENTS — INEVITABLE — LIABILITY FOR. — Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong: Wabash etc. Ry. Co. v. Locke, 112 Ind. 404; 2 Am. St. Rep. 193, and note. This subject will be found further discussed in the extended note to Huey v. Gahlenbeck, 6 Am. St. Rep. 792.

ANIMALS—CARE TO BE EXERCISED OVER.—Care in securing a horse and preventing his escape, which his owner is bound to observe, is that care which every prudent man would exercise in dealing with similar horses at a like place, and under like circumstances: Phillips v. Dewald, 79 Ga. 732; 11 Am. St. Rep. 458. The owner or keeper of a domestic animal which is vicious and prone to do violence, having knowledge of its disposition and habits must, at his peril, keep it safely, so that it cannot do injury, and cannot relieve himself from liability by proving that it escaped without any special negligence on his part: Strouse v. Leipf, 101 Ala. 433; 46 Am. St. Rep. 122, and note; to the same effect, see Reed v. Southern Express Co., 95 Ga. 108; 51 Am. St. Rep. 62, and note.

TALPEY v. WRIGHT.

[61 ARKANSAS, 275.]

NEGLIGENCE, PRIVACY OF CONTRACT.—If a searcher of records is employed by the owner of land to make an abstract to enable him to procure a loan thereon, and such loan being afterward procured on the abstract, and a negotiable note taken therefor, and the holder, being desirous of selling the note, procures the abstract to be continued so as to show the loan and the mortgage, the searcher is not answerable to the purchaser of such note for any injury suffered by him through the incorrectness of the abstract. There is no privity of contract between them.

Action by Charles W. Talpey against defendants, who were searchers of records. It was alleged that as such, at the request of one Rhea, they made an abstract of title to a tract of land claimed to be owned by him, he being required to furnish such abstract before he could procure a loan. The loan company, relying on the abstract, made the loan and took a note secured by a mortgage on the property, and being afterward desirous of selling this note, the company procured the abstract to be continued, so as to show the loan and the mortgage or trust deed in its favor, and the plaintiff, relying on the abstract and continuation, purchased the note; that the defendants knew that the original abstract was procured for the purpose of negotiating a loan, and that the continuation was also obtained for the purpose of effecting a sale of the note taken for the loan, and that the abstract was in fact incorrect, and that the plaintiff had suffered damage therefrom. A demurrer to the complaint was sustained, and a judgment rendered thereon in favor of the defendants.

Joseph M. Hill and Preston C. West, for the appellants.

Cladening, Mechem & Youmans, for the appellee.

279 RIDDICK, J. It is contended that the facts set up in the complaint are sufficient to constitute a cause of action in favor of the appellants. The contention is, that "the abstract was prepared by the appellees, Wright and Robinson, as the basis of a loan to be negotiated through Hoover's agency; that Hoover placed it with the Topeka Investment & Loan Company; that afterward the appellees noted in the abstract the conveyance to Gleed, as trustee for this company, and its assignees; that the appellees then knew that it was placed in a given channel, and was in form designed to pass to the assignees; and that the abstract was made as much for the assignee of the loan company as for the loan company itself." This is the argument of appellant. It is not alleged or contended **280** that

the abstracters knew that the note and security would be sold, or that, if sold, the purchaser would rely upon the abstract of title prepared by them for Hoover and the loan company; but it is said that, as the notes were negotiable, and the conveyances made to secure of the loan company and its assignees, the abstracters were liable for an injury to any purchaser of these notes who relied upon such abstract. To support this contention the case of *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, is cited. In that case Dickle, before purchasing land from Bowman, required that an abstract of the title be furnished. Bowman applied to the Abstract Company, who, at his instance, prepared the abstract for the use of Dickle. The abstract showed title in Bowman, and Dickle relied upon it, and agreed to purchase. Thereupon a deed from Bowman to Dickle was prepared by the Abstract Company. Dickle afterward brought suit against the Abstract Company, alleging that he was injured through its negligence in failing to note a defect in the title. The case went off on demurrer, and the facts alleged are very meagerly set out in the report, but there is no intimation, in the opinion or elsewhere, that there was any want of knowledge on the part of the Abstract Company in regard either to the purpose or the person for whose information and benefit the abstract was intended. So far as we can ascertain, the action was based on a contract made by the Abstract Company with Bowman to prepare an abstract for the use, benefit, and information of Dickle. That being the case, it was held that Dickle had a right of action for injury to him occasioned by the negligence of the Abstract Company in preparing such abstract.

This case has been criticised by counsel for appellees as being in conflict with the leading case of *Savings Bank v. Ward*, 100 U. S. 195. In that case Mr. Justice ²⁸¹ Clifford, who delivered the opinion of the court, said: "It is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same, or to whom they were to be presented. None of those matters are controverted; but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party." In other words, in that case the defendant did not know that the abstract was in-

tended for the use and benefit of the plaintiff, nor the purpose for which it was to be used; he did not contract to make an abstract for the information of plaintiff, and it was held that the plaintiff had no right of action. On the contrary, in *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, the defendant not only made the abstract, but prepared the deed from the grantor to the purchaser, and we infer from the opinion that he knew the person for whose use and benefit it was wanted, and the purpose of it, and the court held that the plaintiff had a right of action. Apart from the rather broad expressions of the judge who delivered the opinion in *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, there does not seem to be any irreconcilable conflict in the points actually decided in the two cases.

But, whether conflicting or not, we do not see that either of those cases support the contention of the appellant in this case. There is no allegation in this complaint from which we can infer that the appellees contracted with Rhea to prepare an abstract for the use and benefit of the appellant, Talpey. They furnished an abstract to Rhea, for the use and information of ²⁸² Hoover and the Topeka Investment & Loan Company. Upon the abstract so furnished, a loan was made to Rhea by such company. If we concede that Hoover, or the Topeka Investment & Loan Company would, under the circumstances, have a right of action against the makers of the abstract for an injury to them occasioned by defects therein, still it would not follow that appellant had a right of action. After the loan had been made, and the abstract had served the purpose for which it was prepared, the appellant purchased the notes executed by Rhea, which were secured by a trust deed on land. The appellant alleges that, before making such purchase, he required of the company that it furnish him an abstract of title, and that the company furnished him the abstract prepared by the appellees, upon which he relied. This action of the Topeka Investment & Loan Company might make it liable for defects in the abstract furnished by them to appellant, but, in the absence of any allegation that they were acting as the agent of appellees in furnishing such abstract, it would not affect the liability of said appellees. The appellees did not contract to furnish the abstracts to appellant, nor to anyone for his use and benefit. We think it clear that he has no right of action against them.

The judgment of the circuit court is therefore affirmed.

SEARCHERS OF RECORDS—NEGLIGENCE.—A maker of an abstract of title to real property guaranteed by him to be correct, is

answerable in damages to the purchaser of such property, who relied upon the abstract, and refused to purchase without it, if recorded conveyances are omitted therefrom to his injury, though the abstract was made at the request and expense of, and delivered to, the owner of the property, who thereupon delivered it to the intending purchaser for examination: *Dickie v. Abstract Co.*, 89 Tenn. 431; 24 Am. Rep. 616, and especially the note thereto: See, also, *Peabody etc. Loan Assn. v. Houseman*, 89 Pa. St. 261; 33 Am. Rep. 757.

NEGLIGENCE—PRIVITY OF CONTRACT.—The necessity that a privity of contract should exist between two persons before one can hold the other liable for negligence is the subject of the extended notes to *Peabody etc. Loan Assn. v. Houseman*, 33 Am. Rep. 760-766, and *Devlin v. Smith*, 42 Am. Rep. 315-319.

EX PARTE HAWKINS.

[61 ARKANSAS, 321.]

A PARDON MAY BE GRANTED ON CONDITION that the person pardoned depart from, and remain without, the state, though the state constitution declares that under no circumstances shall any person be exiled from the state.

Habeas corpus, claiming the petitioner was illegally imprisoned. While serving a sentence in the penitentiary on a conviction for felony he had been pardoned, on condition that he depart from, and remain without, the state, the pardon to be void if he was found within the state after January 12, 1888. He accepted the pardon, and left the state before the day named, but after some years of absence returned, and was arrested and confined in the penitentiary. A demurrer to the petition was sustained.

Dan W. Jones & McCain, for the appellant.

E. B. Kinsworthy, attorney general, for the appellee.

324 RIDDICK, J. The first question for us to determine is, whether the condition upon which the pardon was granted was valid or not. In other words, did the governor have power to annex to his pardon the condition that the petitioner should "depart from and remain without the borders of the state?" It is said, in *Bacon's Abridgment*, that "it seems agreed that the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend": *Bacon's Abridgment*, 412; 4 *Blackstone's Commentaries*, 401.

It is now well settled that when the constitution gives an unrestricted power of pardon to the governor of the state, he has the right to annex to his pardon any condition, precedent or sub-

sequent, provided it be not illegal, immoral, or impossible to be performed: *Ex parte Hunt*, 10 Ark. 284; *United States v. Wilson*, 7 Pet. 150; *Ex parte Wells*, 18 How. 307; *Arthur v. Craig*, 48 Iowa, 264; 30 Am. Rep. 395; *State v. McIntire*, 59 Am. Dec. 576; 1 *Bishop's Criminal Law*, sec. 914.

Our constitution provides that the governor shall have power to grant pardons "under such rules and ³²⁵ regulations as shall be prescribed by law," and a statute expressly authorizes him to grant pardons on condition that the convicted person "shall leave the state and never again return to it": Const. 1874, art. 6, sec. 18; *Sandels and Hill's Digest*, sec. 2412.

But it is said that this statute is in conflict with section 21 of article 2 of the constitution, which provides that under no circumstances shall any person be exiled from the state. We do not agree with this contention. That provision of the constitution forbidding exile was intended as a protection to citizens and inhabitants of the state. Any statute of the legislature, or order of the courts, or executive, inflicting upon a person banishment from the state would, under that section, be void. It forbids exile or compulsory banishment, but it does not say that a person may not, of his own volition, leave the state to escape punishment, or that the governor may not, by his pardon, permit him to do so. To hold that it did would be to construe a provision that was intended to protect the inhabitants of the state into one restricting the power of the governor when exercised in their behalf. Who can doubt that it would be esteemed a great boon by most of these unfortunates, against whom a sentence of imprisonment in the penitentiary for a long term of years has been rendered, to be allowed to escape it by leaving the state? When a citizen of another state or country commits a crime in this state, it might, under some circumstances, be to the best interest of all concerned that a pardon be granted on condition that he leave the state and never return. One can readily conceive of other instances where, to prevent the possibility of future strife between the convicted person and those against whose persons or property he had committed a crime, it would be proper to impose this as a condition of the pardon.

³²⁶ We think the constitution does not deprive the governor of the power to grant pardons on such conditions. As Hawkins accepted his pardon on this condition, and afterward violated it, the pardon by its own terms became void. His subsequent arrest and imprisonment were therefore legal. The judgment of the

court dismissing his petition was, in our opinion, right, and is affirmed.

Bunn, C. J., concurred in the judgment on the ground only that, if the condition was void, the pardon was also void.

PARDONS.—A pardon on condition that the prisoner take up and maintain his residence out of the state during the balance of his life, does not impose any impossible, immoral, or illegal condition; such condition is therefore valid: *State v. Wolfer*, 53 Minn. 135; 39 Am. St. Rep. 582, and note. See, also, the extended note to *State v. McIntire*, 59 Am. Dec. 576.

KANSAS & ARKANSAS VALLEY RAILWAY COMPANY v. FITZHUGH.

[61 ARKANSAS, 341.]

JUDGMENT, RELIEF IN EQUITY.—If, after a trial at law, the right of appeal is cut off by the death of the presiding judge before he can sign a bill of exceptions, relief may be granted in equity by compelling the adverse party to submit to a new trial, if the judgment appears to be contrary to equity and good conscience.

NEGLIGENCE, CONTRIBUTORY, WHEN DOES NOT PREVENT RELIEF.—If a person is placed in a position of danger from an approaching locomotive through his own negligence, but the engineer in charge becomes aware of the danger in time to avoid the injury by the exercise of ordinary care, and through his failure to exercise it the person so imperiled is injured, he is entitled to recover therefor.

AN ADMISSION MADE ON THE TRIAL that the person injured and the person through whose fault he was injured were fellow-servants is a solemn admission made in the course of a judicial proceeding for the purpose of dispensing with evidence or argument, and precludes all other controversy in conflict with the admission.

Suit for the purpose of procuring a new trial. After the trial of the original action the presiding judge died before signing a bill of exceptions, and thereby the complainants were deprived of their right of appeal. The suit in which the judgment had been rendered against the complainants was one brought by H. L. Fitzhugh, administrator of the estate of John Franklin, deceased, and was to recover for injuries claimed to have been sustained by the decedent from the negligence of the defendants. The other facts sufficiently appear from the opinion of the court.

Dodge & Johnson, for the appellant.

Chew & Fitzhugh and Williams & Bradshaw, for the appellee.

³⁴⁶ **RIDDICK, J.** The first question presented is, whether, in a case where there has been a trial and judgment at law, and the right of appeal has been cut off by the death of the presiding

judge before signing the bill of exceptions, a court of equity has power to grant relief against such a judgment, however unjust and oppressive it may be. The practice in such cases is not uniform in the different states of the Union. In some of them it seems to be held that there is no relief: *Davis v. President of Menasha Village*, 20 Wis. 194. In other states, the appellate courts grant a new trial as a matter of right, without regard to the merits of the controversy, where a party has, by the death of the presiding judge, lost the power to file a bill of exceptions: *State v. Weiskittle*, 61 Md. 49; *Wright v. Judge of Superior Court*, 41 Mich. 726; *Board of Commrs. v. Old Dominion S. S. Co.*, 98 N. C. 163. The exact point has never been before this court, though in one case it was said that, "courts of chancery ³⁴⁷ are competent to relieve against any hardships arising from accident, or mistake, or fraud, if from any such cause the bill could not be presented in the time allowed": *Carroll v. Pryor*, 38 Ark. 283. And the power of courts of equity to grant relief against fraud, accident, or mistake has always been recognized. In the case of *Leigh v. Armor*, 35 Ark. 123, the court said: "It is well settled that when a judgment is obtained in a court of law by fraud, accident, or mistake, unmixed with negligence on the part of the party against whom it is rendered, a court of equity has jurisdiction on a showing of a meritorious defense or cause of action to compel the party obtaining the judgment to submit to a new trial. But it is agreed that this power should be exercised with great caution, and the application of the doctrine is generally restricted, and is confined to cases which present peculiar circumstances, under the maxim that there must be an end of litigation." In that case it was held that when a judge of the circuit court was prevented by sudden sickness from disposing of a motion for new trial during the term at which the judgment was rendered, the party filing the motion might, upon showing that he has a meritorious defense or cause of action, and that he has been guilty of no negligence, obtain relief in a court of equity. The reason given was, that the party had no remedy at law. The doctrine of this case has been several times approved: *Vallentine v. Holland*, 40 Ark. 338; *Harkey v. Tillman*, 40 Ark. 551; *Johnson v. Branch*, 48 Ark. 535; *State v. Hill*, 50 Ark. 458; *Whitehill v. Butler*, 51 Ark. 341; *Jackson v. Woodruff*, 57 Ark. 599.

The circuit court in *Leigh v. Armor*, 35 Ark. 123, had not passed upon the motion for a new trial. In this case, the motion for a new trial was presented to and determined by the circuit court, and the party lost his right of appeal by the death of the circuit judge before signing the bill of ³⁴⁸ exceptions. But,

while the facts are different, the principle seems to us the same, and, after considering the matter, we have concluded that when a party who is himself free from fault, and against whom an unjust and inequitable judgment has been rendered, has lost his right of appeal by unavoidable accident, a court of equity in this state has the power to grant relief: *Carroll v. Pryor*, 38 Ark. 283; *Oliver v. Pray*, 4 Ohio, 175; 19 Am. Dec. 595, and note; 1 Black on Judgments, 356; 2 Freeman on Judgments, 484, 485. While the enlarged powers of law courts, under modern procedure, to grant new trials after the expiration of the term has dispensed with the frequent exercise of this ancient jurisdiction of courts of equity, yet in this state it still exists, to be used in peculiar cases where the party is without remedy at law: *Leigh v. Armor*, 35 Ark. 126; *Jacks v. Adair*, 33 Ark. 161.

In assuming jurisdiction in such cases, courts of equity do not undertake to exercise supervisory or appellate power over the circuit courts. They have no right to interfere in any way with the judgments or other proceedings of a court at law. They assume only the right to act upon the parties to the suits at law: *Pelham v. Moreland*, 11 Ark. 442; *Yancey v. Downer*, 5 Litt. 8; 15 Am. Dec. 38; 3 Pomeroy's Equity Jurisprudence, sec. 136; 1 Black on Judgments, 356.

When a case of hardship in the judgment of a court at law is alleged, against which the party has lost his remedy at law by unavoidable accident, fraud, or mistake, a court of equity, though proceeding with great caution, will inquire into the facts, and, if deemed proper, will compel the successful party to submit to a new trial at law, or, in default thereof, will restrain him by injunction. But, as has been frequently said, a court of equity will not interfere in such cases, unless "justice imperatively demands it." "It must clearly ³⁴⁹ appear that it would be contrary to equity and good conscience to allow the judgment to be enforced, else it declines to impose terms upon the prevailing party": *Whitehill v. Butler*, 51 Ark. 343; *Johnson v. Branch*, 48 Ark. 535; *Jackson v. Woodruff*, 57 Ark. 599.

We will now consider whether the case made here is one calling for the interference of a court of equity. John Franklin, an employé of the appellants, while working in their yards at Van Buren, was struck and killed by an engine owned by them, and operated by their employé's. H. L. Fitzhugh, the administrator of his estate, brought suit against appellants, alleging that the death of Franklin was occasioned by the negligence of appellants and their employé's while operating said engine. The answer of appellants denied negligence, and set up contributory

negligence, and, further, that the injury was occasioned by the act of a fellow-servant, for which they were not liable. The evidence at the trial showed that Franklin, at the time of the injury, was working in the yards of appellants at Van Buren. He was clearing under a switch rod, stooping over at his work, with his back toward a switch engine, which was approaching along the same track upon which he was working. Within eight or ten feet of him, on a different track, was another engine which, to use the language of the witness, was "popping off steam." The noise of this escaping steam deadened the sound made by the approaching switch engine. The testimony of several witnesses show that Franklin's position and actions indicated that he was unaware of the approach of the switch engine and of the danger that threatened him. So apparent was his danger, and the fact that he was ignorant of it, that several of these witnesses hallooed at him, but the noise of the steam from the other engine was so great that he did not hear. Both the engineer ³⁵⁰ and fireman in charge of the switch engine testify that they saw Franklin as they approached the place where he was working. The engine was backing, but it had no cars attached, and the tank was wedge shaped, and offered no obstruction to the sight of the engineer until he came within a few feet of Franklin. He was in plain view for some distance before they reached him. They noticed that he was stooping over at work, his back to the engine, apparently unaware of its approach. When about forty yards from him, the fireman hallooed at him, and again endeavored to attract his attention when he was within twenty-five or thirty steps of him. The fireman testified that he did not signal the engineer, because the engineer saw Franklin as well as he did. Before reaching Franklin, the engineer applied the air brakes, and checked the speed of the engine, but when within seven or eight feet of him he released the brakes, and the engine rolled on, and Franklin was struck and killed. The engineer says that he saw Franklin step off the track before he released the brakes, but in this he is plainly mistaken. Franklin became aware of the approach of the engine, and endeavored to escape, but the engine struck either his leg or the handle of his shovel, and he was thrown on the track and killed. There was also evidence tending to show that no sufficient effort was made to stop the engine, and that the engineer was guilty of carelessness.

But it is said that Franklin was himself guilty of negligence. This may be true, yet the finding of the jury is justified on the ground that the employes of defendants in charge of the engine became aware of his danger in time to have avoided the injury by

the use of ordinary care. It is well established that when a defendant, after having become aware of the plaintiff's negligence, and the danger to which it exposes him, fails to exercise ordinary care in avoiding it, he is liable for ³⁵¹ the injury: *St. Louis etc. Ry. v. Wilkerson*, 46 Ark. 523; *St. Louis etc. Ry. Co. v. Monday*, 49 Ark. 263; *Whittaker's Smith on Negligence*, 375; 2 *Thompson on Negligence*, 1157; *Wharton on Negligence*, secs. 334, 335; *Shearman and Redfield on Negligence*, sec. 493.

It is further said that if the engineer was guilty of negligence causing the injury, it was the act of a fellow-servant, for which defendants are not liable. But the evidence shows that, on the trial at law, the defendants expressly admitted that the deceased, John Franklin, and the engineer were not fellow-servants. The bill of exceptions, which was agreed to be correct, and introduced as evidence by appellant, after setting out the evidence introduced by the plaintiff, proceeds as follows: "Defendants here admitted that the deceased, John Franklin, and the engineer and fireman were not fellow-servants, and told plaintiff that they so admitted to the jury. The plaintiff then rested." This is what is called in the books a "solemn admission," made in the course of a judicial proceeding for the purpose of dispensing with evidence or argument touching the matter admitted. Having solemnly admitted on the trial that the deceased, John Franklin, and the engineer and fireman were not fellow-servants, the defendant cannot now dispute it, or assume a position inconsistent with the admission. If the circuit court committed an error on that point, it was one invited by the defendants, and of which they cannot complain: 1 *Greenleaf on Evidence*, 186; 1 *Taylor on Evidence*, 676; *Elliott's Appellate Procedure*, sec. 630.

Our conclusion is, that the facts of this case are not sufficient to warrant the interference of a court of equity, and the decree of the chancellor dismissing the complaint for the want of equity is affirmed.

JUDGMENTS—RELIEF IN EQUITY.—If the right of appeal is lost because of the death of the trial judge before he can sign a bill of exceptions, relief can be obtained in equity compelling the successful party to submit to a new trial if the judgment is against equity and good conscience: *Little Rock etc. Ry Co. v. Wells*, 61 Ark. 354; post, p. 216, and note.

NEGLIGENCE—CONTRIBUTORY—WHEN DOES NOT PREVENT RELIEF.—One brought into danger by the wrong of another is not bound when confronted by sudden and unexpected peril to act with coolness and deliberation: *Pennsylvania Co. v. Stegemeyer*, 118 Ill. 305; 10 Am. St. Rep. 136, and note. Slight contributory negligence of a person injured defeats his right of recovery, though the defendant or his servants were grossly negligent if the injury was suffered through such negligence of the plaintiff. This rule does not apply where the defendant, or his servants, dis-

cover the peril of the person subsequently injured, and do not use reasonable precautions to avoid injuring him: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1; 40 Am. St. Rep. 803, and note with the cases collected. Contributory negligence is not always chargeable upon the failure to exercise the greatest prudence, or the best of judgment in cases where a person is called upon to act suddenly, or in an emergency: *Valin v. Milwaukee etc. R. R. Co.*, 82 Wis. 1; 83 Am. St. Rep. 17, and note. See the extended notes to *Pennsylvania Co. v. Sinclair*, 30 Am. Rep. 190.

LITTLE ROCK & FORT SMITH RY. CO. v. WELLS.

[61 ARKANSAS, 354.]

JUDGMENT, RELIEF AGAINST IN EQUITY.—If the right of appeal is lost because of the death of the trial judge before he can sign a bill of exceptions, relief can be obtained in equity compelling the successful party to submit to a new trial, if the judgment is against equity and good conscience.

A JUDGMENT WILL NOT BE RELIEVED AGAINST IN EQUITY BECAUSE OF MERE ERRORS committed by the trial judge in charging the jury, though the right of appeal is cut off by his death before he can sign a bill of exceptions, unless it further appears to be against equity and good conscience to permit the judgment to be enforced.

A JUDGMENT WILL BE RELIEVED AGAINST IN EQUITY where there was no evidence to show that the prevailing party had any cause of action, and his adversary's right of appeal was cut off by the death of the trial judge before he could sign a bill of exceptions.

EVIDENCE, PRESUMPTION AS TO DISTANCE BETWEEN MILEPOSTS.—There is no presumption that mileposts along the line of a railway were put there by the railway corporation, or that they are a mile apart. They are, therefore, not admissible against it as evidence of the distance between two stations.

JURY TRIAL, ERROR IN DISALLOWING A CHALLENGE.—If it appears that two of the persons called as jurors in an action against a railway corporation have actions pending against it involving the same issues, and have opinions respecting the chief point in issue, it is error in the trial court to overrule a challenge, and to hold them competent to act as jurors in the case.

Dodge & Johnson, for the appellants.

355 RIDDICK, J. There are two questions in this case: 1. Has a court of equity the power to grant the relief prayed for? and 2. If the power be conceded, is this such a case as calls for its exercise? The first question has been considered and answered in the affirmative by our ruling in the case ³⁵⁶ of *Kansas etc. R. R. Co. v. Fitzhugh*, 61 Ark. 341, ante, p. 211, and we need only consider the second question.

It is said that the trial court committed error in impaneling, and also in charging, the jury. But errors alone are not sufficient to warrant the interposition of a court of equity. "It must clearly appear that it would be contrary to equity and good con-

science to allow the judgment to be enforced, else equity declines to impose terms upon the prevailing party": *Whitehill v. Butler*, 51 Ark. 343; *Kansas etc. R. R. Co. v. Fitzhugh*, 61 Ark. 341, ante, p. 211. But a consideration of the evidence introduced in the action at law leads us to the conclusion that the verdict and judgment against the appellant were without evidence to support it. To warrant a judgment for the penalty imposed against appellant in the action at law, it was essential that there should be some evidence tending to show that the amount charged the appellee was greater than three cents per mile for the distance he was carried as a passenger: *Sandels and Hill's Digest*, secs. 6211, 6217. Now, an examination of the evidence shows that there was no competent evidence introduced to show the distance between the stations of Van Buren and Dyer and Alma and Dyer. The only witnesses that testified were the appellee and his attorney. Neither of them told, or pretended to know, what the distances between these stations were. They gave the number of the nearest milepost to each station, and stated that the mileposts showed the distances between the stations to be a certain number of miles, but there is nothing to show that the appellant had any connection with these mileposts. We cannot tell from the evidence whether the mileposts referred to are located on the railway right of way, or along the public road; nor whether they were erected by the county, or the appellant, or some other railway company. The attention of the court and counsel was called to this defect in the proof³⁵⁷ on the trial of the case, and the court was asked to direct a verdict for appellant for want of evidence showing the distances between the stations named. The court refused to do so, and assumed in his instructions that the mileposts had been put up by appellant. He commenced the second paragraph of his instruction as follows: "In regard to those mileposts, the company has put up mileposts along the road, as the proof shows here, and put consecutive numbers on them. I suppose, when they began, they commenced one mile from the starting point, then two, and then three, the same as a proclamation, as to the distance, etc."

The circuit judge in giving this instruction no doubt labored under the impression that there was no dispute concerning the question as to whether or not the appellant had put up the mileposts. But we are bound by the record, and it shows that the question as to the distances between the stations was the principal point in issue, and that no admissions were made, the attorney for appellant contending that the proof on this very point was insufficient.

In addition to this instruction, which was calculated to mislead the jury on a material point, two of the jurors admitted on their examination that each of them had brought suit against appellant to collect a penalty for an overcharge for passenger carriage between the same stations of Alma and Dyer, that these suits had been tried the term before, and that each of them held an opinion as to the distance between these stations. For this cause they were challenged by defendant, but the court held that they were competent, and, the defendant having exhausted its peremptory challenges, they sat in the trial of the case. These jurors having only a short time before been plaintiffs in an action against appellant, in which the same issues were involved, the challenge ³⁵⁸ of defendant should have been sustained: *Railway Co. v. Smith*, 60 Ark. 222.

When we consider these rulings of the court in connection with the fact that the verdict and judgment is not supported by the evidence, we must conclude that the appellant was entitled to a new trial, and that he would have obtained it, but for the fact that his appeal was cut off by an inevitable accident, which left him without remedy at law. It seems unjust and inequitable that the appellee should be allowed to retain the advantage given him by the sudden death of the presiding judge. As the appellant is remediless at law, we believe that this is a proper case for a court of equity to exercise its restraining power, to the end that justice may be done: *Kansas etc. R. R. Co. v. Fitzhugh*, 61 Ark. 341; ante, p. 211; *Carroll v. Pryor*, 38 Ark. 283; *Leigh v. Armor*, 35 Ark. 128; *Oliver v. Pray*, 4 Ohio, 675; 19 Am. Dec. 595, and note; 1 Black on Judgments, 386; 2 Freeman on Judgments, 484, 485.

It is therefore ordered that the decree of the chancellor be reversed, and that, unless the appellee, Thomas H. Wells, shall elect to submit to a new trial at law on the issue involved in his action against appellant for a penalty, he be forever enjoined from enforcing, or attempting to enforce, the judgment recovered by him in said action.

Relief in Equity. Other than by Appellate Proceedings, against Judgments. Decrees, and other Judicial Determinations.*

The jurisdiction of equity, as directed against judicial proceedings, except when exercised by bills of review, is personal in its character,

* REFERENCES TO MONOGRAPHIC NOTES.

Power of equity to relieve against judgments at law: Note to *Oliver v. Pray*, 19 Am. Dec. 602-612.

Bills of review, their nature and scope: Note to *Brewer v. Bowman*, 20 Am. Dec. 160-175.

Judgments based on the unauthorized appearance of an attorney: Note to *Bunton v. La Ford*, 75 Am. Dec. 146-151.

Relief from judgments obtained by perjury: Note to *Pico v. Cohn*, 25 Am. St. Rep. 165-171.

Negligence as a bar to relief in equity from judgments at law: Note to *Payton v. McQuown*, 53 Am. St. Rep. 444-453.

and is confined to preventing the party or parties in whose favor some judgment or other determination has been made from making an inequitable use thereof. The enforcement of a judgment may be inequitable either because it was against equity and good conscience to enforce it from the very beginning, or because, though its enforcement was at one time proper, subsequently occurring circumstances have changed the relations of the parties and made it inequitable to insist upon its further execution.

Proceedings or Judgments Subject to.—It follows from the fact that the action of a court of equity, in undertaking to grant relief from a judgment or other decision, must operate in personam, that its power extends to and against every class of judgments or decisions against which relief of an injunctive character may be effective, and in which a court of equity may call the parties in interest before it for the purpose of inquiring and determining whether such relief ought to be awarded, and, on the other hand, that where this kind of relief cannot be operative or the parties to the judgment cannot be summoned before a court of equity, the judgment itself must be treated as one against which equity is powerless, though the further use of the judgment is alleged to be contrary to equitable principles.

If a person accused of a crime is convicted and sentenced to be punished, the people or the sovereign cannot be called into a court of equity on the allegation that the judgment is inequitable, and for that reason ought not to be carried into execution. In truth, if a suit were commenced for this purpose, there would be no means of acquiring jurisdiction over the adverse party. Whether this is the reason for declining jurisdiction or not, it is well settled that a court of equity will not undertake to enjoin the execution of a sentence in a criminal cause: *Moses v. Mayor of Mobile*, 52 Ala. 198; *Tyler v. Hammersly*, 44 Conn. 419; 26 Am. Rep. 479; *Gault v. Wallis*, 53 Ga. 675; *Stuart v. Supervisors*, 83 Ill. 341; 25 Am. Rep. 397; *Holderstaffe v. Saunders*, 6 Mod. 16; *Lord Montague v. Dudman*, 2 Ves. Sr. 396.

There is another class of cases in which the reason for declining jurisdiction as ordinarily stated is not to our minds so convincing. We refer to cases in which wills have been admitted to probate, and it is alleged either that they were forged or have been revoked by a subsequent will made by the testator, and therefore that the parties claiming under such forged or revoked will ought to be enjoined from further asserting it. There seems to be no doubt that in such a case equity will decline to interfere: *State v. McGlynn*, 20 Cal. 234; 81 Am. Dec. 118; *Waters v. Stickney*, 12 Allen, 1; 90 Am. Dec. 122; *Gaines v. Chew*, 2 How. 645; *Colton v. Ross*, 2 Paige, 396; 22 Am. Dec. 648; *Brown v. Brown*, 86 Tenn. 277; *Freeman on Judgments*, sec. 608; and the reason commonly alleged is, that a court of equity has no jurisdiction over matters of probate and no power to determine whether a will has been properly executed or not. Conceding this to be true, it might well be insisted that the court has jurisdiction over the parties to be benefited by such wills, and might, upon proper equitable considerations, act in personam against them, and compel them to refrain

from using the advantage which has been given them by the probate of the forged or revoked will. It is, however, as we shall hereafter show, a general rule of equity jurisprudence that a court of equity will not undertake to try and determine the precise question which was determined at law or in some other appropriate tribunal, and, therefore, that even in a case of alleged fraud, equity cannot assume jurisdiction where the fraud is not extrinsic and can only be ascertained by a retrial of an issue which has already been tried and determined. In the class of cases to which we are here referring, it cannot be determined whether the will was forged or not without retrying the very issue that was presented in the proceeding in probate, and upon such trial determining that the evidence offered was false and perjured. An inquiry of this character may well be declined upon the reasons which have induced courts of equity in other cases to refuse to entertain applications to grant relief from judgments upon the alleged ground that they were procured by false and perjured testimony.

While the jurisdiction of courts of equity to interfere with proceedings at law was long disputed and greatly excited the jealousy of the common-law judges, it has been established for centuries (Cochran v. Eldridge, 49 Pa. St. 365, 368; Douglass v. Joyner, 57 Tenn. 32; note to Oliver v. Pray, 19 Am. Dec. 608; Phillips v. Negley, 117 U. S. 665; Lloyd v. Mansell, 1 P. Wms. 73; 1 Spence's Equity Jurisprudence, 673-675), and, with the exceptions stated, extends to every class of legal proceedings. Hence, relief may be granted in proper cases against the decrees of ecclesiastical courts: Van Brough v. Cock, 1 Cas. Ch. 201; Bisell v. Axtell, 2 Vern. 47; the award of arbitrators: Cochran v. Eldridge, 49 Pa. St. 365; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604; and decrees of divorce: Ex parte Smith, 34 Ala. 455; Rawlins v. Rawlins, 18 Fla. 345; Lawrence v. Lawrence, 73 Ill. 577; Smithson v. Smithson, 37 Neb. 535; 40 Am. St. Rep. 504; Johnson v. Coleman, 23 Wis. 452; 99 Am. Dec. 193; Freeman on Judgments, sec. 489. Nor is relief confined to judgments at law.

There is no doubt of the power of a court of equity in one suit to grant relief from a decree granted in another: Oro Fino Co. v. Cullen, 1 Idaho, 113; Daniell's Chancery Practice, 4th Am. ed., 974, 1584, 1585; though this authority may often be called into action by bills of review founded upon newly discovered matter: Note to Brewer v. Bowman, 20 Am. Dec. 168. The action of equity may be directed against the judgments of inferior courts as well as against those of a higher character, and hence a judgment of a justice of the peace may be enjoined: Greenwalt v. May, 127 Ind. 511; 22 Am. St. Rep. 660. In fact, whatever be the judicial action, if the circumstances are such that the party in whose favor it is ought not to be permitted to take or retain the advantage which it gives him, there seems to be no reason why a court of equity may not act against him by injunction.

The jurisdiction of courts authorized to administer and distribute the estates of decedents or the property of insolvent debtors is extremely important, and the power to grant relief from decrees and orders made in the exercise of this jurisdiction is, with the excep

tions already noted, as undoubted, as is the power to grant relief against ordinary judgments at law. Hence, relief may be granted in equity against orders or decrees of probate or surrogate courts settling the accounts of guardians, administrators, or executors: *Mock v. Steele*, 34 Ala. 198; 73 Am. Dec. 455; *Green v. Creighton*, 10 Smedes & M. 159; 48 Am. Dec. 742; *Salter v. Williamson*, 2 N. J. Eq. 480; 35 Am. Dec. 513; *Black v. Whitall*, 9 N. J. Eq. 572; 59 Am. Dec. 423; *Elrod v. Lancaster*, 2 Head, 571; 75 Am. Dec. 749; and also against orders procured therein for the sale of property of decedents: *Cowin v. Toole*, 31 Iowa, 513. Relief may also be had against orders or decrees made in proceedings in insolvency whereby a fraudulent transfer of property has been effected or some other inequitable advantage gained: *Kilgore v. Kilgore*, 103 Ala. 614.

General Grounds of Relief.—By our statement that courts of equity may interpose to prevent the enforcement of a judgment as against one who is not equitably entitled to further assert it as a cause of action or as defense, we do not wish to be understood as affirming that these courts will re-examine questions decided by other tribunals for the purpose of determining whether the decision was correct, either according to the principles of law or those of equity jurisprudence. For if the tribunal deciding the question or rendering the judgment, order, or decree had jurisdiction, and the person complaining of the decision had an opportunity to present his defense or cause of action, the decision will not be treated as inequitable because of any error of the court or tribunal in coming to its conclusion or in conducting the proceedings anterior thereto. In other words, courts of equity do not exercise a revisory jurisdiction in proceedings to enjoin judgments or other decisions, but interpose only when, from some cause, not attributable to the fault of the complainant, he was not able to present his cause of action or of defense to the court or tribunal having jurisdiction of it, and his inability to so present it has resulted in his injury. In every case in which application is made to a court of equity by an independent suit for relief against a judgment or other decision, it is incumbent on the complaint to establish: 1. That he has lost a cause of action or of defense, or some part thereof; 2. That such loss occurred either because the court in the former proceeding or action was not competent to hear it and to grant relief thereupon, or because he was prevented from presenting it or having it properly considered, either through fraud, accident, mistake, or some other sufficient ground for the interposition of equity; and 3. That unless he secures relief in equity, he will be without any adequate remedy: *Headley v. Bell*, 84 Ala. 346; *Harding v. Hawkins*, 141 Ill. 572; 33 Am. St. Rep. 347; *Ratliff v. Stretch*, 130 Ind. 282; *Whitaker v. Wickersham*, 5 Del. Ch. 187; *Luinger v. Glenn*, 33 Neb. 187; *Proctor v. Pettit*, 25 Neb. 96; *Phillips v. Pullen*, 45 N. J. Eq. 5; *Yorke v. Yorke*, 3 N. Dak. 343. There may, however, be cases in which it does not appear that the judgment as originally entered was inequitable, but in which, owing to circumstances occurring after its rendition, it can no longer be enforced without a disregard of equity and good conscience, and in

these cases relief by injunction may also be had if there is no other adequate remedy.

Merits, Showing of, Whether Essential.—It is not sufficient, in a suit for relief against a judgment or other decision, to show that it was procured by fraud or was due to surprise, mistake, accident, or some other ground for the interposition of equity, if the defendant has suffered no injury from it, or if the same decision must have resulted had there been a trial of the cause upon the merits. Whatever be the ground for relief, the defendant must, in addition, show that the judgment or decision of which he complains is unjust. If, being a plaintiff, he had no cause of action, or, being a defendant, he had no just ground of defense, but some wrong was done him during the prosecution of the action whereby a judgment was entered wrongfully or even fraudulently, he will be left to his legal remedies, if any he has. Therefore, in every bill seeking relief against a judgment, merits on the part of the complainant must be shown, otherwise it will not be deemed sufficient to call for the interposition of the extraordinary remedies and powers of equity: *Harding v. Hawkins*, 141 Ill. 572; 33 Am. St. Rep. 347; *Rupert v. Martz*, 116 Ind. 72; *Hollinger v. Reeme*, 138 Ind. 363; 46 Am. St. Rep. 402; *Mulvaney v. Lovejoy*, 37 Kan. 305; *Sauer v. Kansas*, 69 Mo. 46; *Petalka v. Fittle*, 33 Neb. 756; *Wilson v. Shipman*, 34 Neb. 573; 33 Am. St. Rep. 660; *Dringer v. Receiver*, 42 N. J. Eq. 573; *Stout v. Slocum*, 52 N. J. Eq. 88; *Crocker v. Allen*, 34 S. C. 452; 27 Am. St. Rep. 831; *Mastersson v. Asheem*, 54 Tex. 12; *Nye v. Sochor*, 92 Wis. 40; 53 Am. St. Rep. 896; *Thomas v. West*, 59 Wis. 103; *Wilkinson v. Rewey*, 59 Wis. 554; *White v. Crow*, 110 U. S. 183. Many of the courts require such a disclosure of the facts in the bill as will enable them to judge whether or not the complainant has been deprived of a meritorious defense or cause of action, and are not satisfied with a general allegation upon this subject: *Whitehill v. Butler*, 51 Ark. 341; *Jeffery v. Fitch*, 46 Conn. 601; *Mulvaney v. Lovejoy*, 37 Kan. 305; *Chicago etc. Ry. v. Manning*, 23 Neb. 552; *Winters v. Means*, 25 Neb. 241; 13 Am. St. Rep. 489; *Langley v. Ashe*, 38 Neb. 53. While courts of equity do not assume in suits of this character a revisory jurisdiction, nor ordinarily attempt to decide mere questions of law, yet to some extent they cannot avoid so doing. Thus, if the complainant claims to have lost some right, either through accident, surprise, or some other ground for equitable interference, the court will not accept his statement of this fact as conclusive, but must necessarily examine into the matter, at least, so far as to ascertain whether he is acting in good faith in making his complaint. If facts are stated in the bill or proved in evidence for the purpose of showing that he had a cause of action or of defense in the original action or proceeding, the court must determine whether such facts did amount to such defense or cause of action, because, if they did not, the court will not interfere: *Johnson v. Branch*, 48 Ark. 535. If, as in the principal case, it is claimed that the right to move for a new trial had been lost by accident, the court will not interfere when, from all the facts, it appears that there was no sufficient ground for the mo-

tion for a new trial, and though the accident had not happened, the decision must have been against the complainant: *Kansas etc. Ry. Co. v. Fitzhugh*, 61 Ark. 341; 54 Am. St. Rep. 211.

We apprehend, however, that there must be cases in which the complainant must be entitled to relief though he had no defense to the original action, because the use made of the judgment has been such as to deprive him of property of much greater value than the amount of his indebtedness. Thus, though the action may have been for a just debt, which the defendant ought to have paid, it does not follow that he ought to be subject to the loss of his property, when through the act of his adversary, or through accident or mistake, he did not know of his peril. Hence, if a judgment is obtained without the service of process on the defendant, and his property is sold, and the time for redemption expires before he has any knowledge of the proceedings against him, and he is thus cut off from all remedy, unless one is given him in equity, the mere fact that he had no defense in the original action will not, we think, deprive him of relief, at least when he offers to pay whatever is justly due: *Martin v. Parsons*, 49 Cal. 94; *Great etc. Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204; *Litchfield's Appeal*, 28 Conn. 127; 73 Am. Dec. 662

Indeed, in every instance in which process has not been served on the defendant, but judgment has nevertheless been rendered against him by a court not having jurisdiction of his person, it would seem that the wrong done him by assuming to determine his cause when the court was without authority to do so ought to be undone, and he ought to be left in the same condition as if jurisdiction had not been wrongfully assumed over him, and therefore that he ought not to be required to make any showing of merits. For even though he owed a just debt, this can hardly warrant his creditor in obtaining judgment by fraud or in inducing the court to act under a mistaken belief that jurisdiction has been acquired: *Ryan v. Boyd*, 33 Ark. 778; *Wilson v. Sparkman*, 17 Fla. 871; 35 Am. Rep. 110; *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *White v. Espey*, 21 Or. 328; *Bell v. Williams*, 1 Head, 229; *Finney v. Clark*, 86 Va. 354; *Mills v. Scott*, 43 Fed. Rep. 452. In one state the middle ground has been taken that in such a case a complainant seeking relief should allege that he had a meritorious defense in the original action, but that such allegation is not traversable: *Wilson v. Hawthorne*, 14 Colo. 530; 20 Am. St. Rep. 290. The decided weight of authority, however, is that even though the court had not acquired jurisdiction of the defendant, he will be left to his remedy at law, if any he has, and will be denied relief in equity unless he can show that, had he had an opportunity to make his defense, he would have wholly or in part established it, and that the judgment against him was therefore substantially unjust: *Secor v. Woodward*, 8 Ala. 500; *Dunklin v. Wilson*, 64 Ala. 162; *Cromelin v. McCauley*, 67 Ala. 542; *Waldrom v. Waldrom*, 76 Ala. 285; *State v. Hill*, 50 Ark. 458 (overruling *Ryan v. Boyd*, 33 Ark. 778); *Gregory v. Ford*, 14 Cal. 138; 73 Am. Dec. 639; *Geraty v. Druiding*, 44 Ill. App. 440; *Burch v. West*, 134 Ill. 258;

Piggot v. Addicks, 3 G. Greene, 427; 56 Am. Dec. 547; *Crawford v. White*, 17 Iowa, 560; *Coon v. Jones*, 10 Iowa, 151; *Fowler v. Lee*, 10 Gill J. 363; 32 Am. Dec. 172; *Harris v. Gwin*, 10 Smedes & M. 563; *Stewart v. Brooks*, 62 Miss. 492; *Wilson v. Shipman*, 34 Neb. 573; 33 Am. St. Rep. 660; *Janes v. Howell*, 37 Neb. 320; 40 Am. St. Rep. 494; *Pilger v. Torrence*, 42 Neb. 903; *Gifford v. Morrison*, 37 Mo. St. 502; 41 Am. Rep. 537; *Spooner v. Leland*, 5 R. I. 348; *Crocker v. Allen*, 34 S. C. 452; 27 Am. St. Rep. 831; *Stokes v. Knarr*, 11 Wis. 389; *Farwell v. Hilbert*, 91 Wis. 437; *Ford v. Hill*, 92 Wis. 188; 53 Am. St. Rep. 902. In employing the term "meritorious defenses," we do not wish to be understood as indicating that the court will discriminate against defenses which have been made sufficient by statute, though they may not in the abstract be at all times considered as just. Thus, if the original action was not brought until the cause was barred by the statute of limitations, and the defendant did not know of the pendency of the action against him, he will not be denied relief because his defense rested wholly on such statute: *Gerrish v. Seaton*, 73 Iowa, 15.

Equitable defenses to former action.—Having shown that he had a defense or cause of action on the merits, it is next incumbent on the complainant to allege and establish either that he was not bound to present it in the former action, or that he could not avail himself of it, because the court was not competent to hear it and to grant him relief thereupon, or that he was prevented from presenting it and having it properly considered through fraud, accident, mistake, or some other sufficient ground for the interposition of equity. If a defendant has a defense of an equitable character which the court in the former action was not competent to consider, and grant relief, there can be no question that he may have relief in chancery against the judgment, whether he made an ineffectual attempt to assert his equitable defenses or not: *Calloway v. McElroy*, 3 Ala. 406; *Jenkins v. Harrison*, 66 Ala. 345; *Newton v. Field*, 16 Ark. 216; *Worthington v. Curd*, 22 Ark. 277; *Kersey v. Rash*, 3 Del. Ch. 321; *Pollock v. Gilbert*, 16 Ga. 416; 60 Am. Dec. 732; *Radcliffe v. Varney*, 56 Ga. 222; *Waters v. Perkins*, 65 Ga. 32; *McCurry v. Robinson*, 23 Ga. 321; *White v. Crew*, 16 Ga. 398; *Vennum v. Davis*, 35 Ill. 568; *Hawley v. Simons*, 102 Ill. 115; *Chicago etc. Ry. Co. v. Hay*, 119 Ill. 493; *Harding v. Hawkins*, 141 Ill. 572; 33 Am. St. Rep. 351; *Bachelder v. Bean*, 76 Me. 370; *Mosby v. Wall*, 23 Miss. 81; 55 Am. Dec. 71; *Spaur v. McBee*, 19 Or. 70; *Dunham v. Downer*, 31 Vt. 249; *Johnson v. Christian*, 128 U. S. 374; *Crim v. Handley*, 94 U. S. 652; *Story's Equity Jurisprudence*, sec. 1573; *Arnold v. Grimes*, 2 Iowa, 1. A familiar illustration of cases of this character arises when one sued in ejectment has not the legal title, and therefore has not an available defense at law, but the circumstances are such that, in a court of equity, he might compel the conveyance of such title to him. In such a case, unless the court is competent to receive the equitable defenses and grant relief thereon, it is manifest that judgment must be rendered against him, and he must be left to seek redress by some original proceeding in equity which will have the effect to vest him with the legal title and prevent the further assertion of

the judgment against him. In perhaps the greater part of the United States the same tribunal is given jurisdiction both of actions at law and of suits in equity, and thereby the necessity of resort to an independent suit in equity, where an equitable defense exists to a suit at law, is obviated. Independent of the provisions of the modern codes, there may be other instances in which defenses of an equitable nature may be interposed to actions at law. Where, from any cause, it is within the power of a defendant in an action at law to present as an equitable defense a cause which he might have made the basis of an independent suit at law, the question must arise whether he is bound to avail himself of his equitable defense in the action at law against him, or may still, as formerly, seek relief against any judgment that may be rendered against him by applying to courts of chancery. The answer given by a majority of the decisions upon this subject is, we think, that the right to make the defense in the original action is a mere privilege which the defendant is at liberty to assert or not, as he may deem best, and therefore that where he makes no effort to assert it, he may, after the entry of a judgment against him, obtain relief therefrom by a suit in equity: *Hempstead v. Watkins*, 6 Ark. 317; 42 Am. Dec. 696; *Hough v. Waters*, 30 Cal. 310; *Golson v. Dunlap*, 73 Cal. 165; *Lorraine v. Long*, 6 Cal. 452; *Hills v. Sherwood*, 48 Cal. 386; *Fannin v. Thomasson*, 45 Ga. 533; *Brown v. Wyncoop*, 2 Blackf. 230; *Morrison v. Hart*, 2 Bibb, 4; 4 Am. Dec. 663; *Clay v. Fry*, 6 Am. Dec. 654; *Dorsey v. Reese*, 14 B. Mon. 157; *Hill v. Cooper*, 6 Or. 181; *Spaur v. McBee*, 19 Or. 70; *Allen v. Stephanus*, 18 Tex. 658. The rule in other states is, however, in conflict with the authorities just cited, and is to the effect that "the defendant who has an equitable defense to an action being now authorized to interpose it by answer is bound to do so, and shall not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court": *Kelly v. Hurt*, 74 Mo. 561; *Winfield v. Bacon*, 24 Barb. 154; *Foot v. Sprague*, 12 How. Pr. 355; *Savage v. Allen*, 54 N. Y. 458; *Mandeville v. Reynolds*, 68 N. Y. 528; *Tuttle v. Harrill*, 85 N. C. 456. If, on the other hand, the defendant avails himself of his privilege to assert his equitable defense against the action at law, he is bound to fully present it, and a decision against him is, therefore, conclusive against the existence of such defense, and must necessarily preclude him from obtaining relief against the judgment by an independent suit in equity, except, indeed, where he can show that his attempt to make such defense proved unavailing through fraud, accident, mistake, or some other sufficient ground to induce the action of a court of equity: *Burton v. Hynson*, 14 Ark. 32; *Paynell v. Hahn*, 61 Cal. 131; *Harlan v. Wingate*, 2 J. J. Marsh, 138; *Preston v. Rickets*, 91 Mo. 320; *St. Louis v. Schulenberg*, 98 Mo. 613; *Curtis v. Cisne*, 1 Ohio, 432; *Winpenny v. Winpenny*, 92 Pa. St. 440; *Reas v. Vickers*, 27 W. Va. 456; *Arnold v. Allinor*, 15 Grant U. C. 375; *Hendrickson v. Hinckley*, 17 How. 443.

Where the defendant has the right to elect whether or not he will make his defense in the action at law, the question must frequent-

ly arise as to whether he has made such election, and whether, after being made, it can be abandoned. In some cases, it has been held that his election was irrevocably made "by offering any defense whatever, it matters not whether by demurrer to the declaration, by plea in abatement, or in bar": *Haughly v. Strong*, 2 Port. 177; 27 Am. Dec. 648; *Arrington v. Washington*, 14 Ark. 218; *Dickson v. Richardson*, 16 Ark. 114; *Dutil v. Pacheco*, 21 Cal. 438; 82 Am. Dec. 749; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; 1 Am. Dec. 121. In another case, it was held that though an equitable defense to an action of ejectment was interposed by an answer alleging facts showing that the defendant was entitled to a conveyance of the property, that such defense might subsequently be withdrawn, and though not formally withdrawn, the failure of the defendant to appear and give any evidence at the trial might be regarded as equivalent to a formal withdrawal, and therefore that in such a case he was not precluded by the judgment against him from seeking and obtaining relief by a subsequent suit in equity: *McCreary v. Casey*, 45 Cal. 128.

As to defenses existing to the original action, unless they were of an equitable character and by the rules of practice prevailing in the state where the action was brought, the defendant was at liberty either to present them in such action or to reserve them for an independent suit in equity, it is his duty to present them, and, failing to do so, he cannot assert them in another action or proceeding, nor make them a ground for relief from a judgment, unless his failure to so present them was due to some cause recognized under the circumstances as a ground for equitable relief: *Ludeling v. Chaffee*, 40 La. Ann. 645; *Postlewhaite v. Ghiselin*, 97 Mo. 420; *Mills v. Mills*, 115 N. C. 475; 116 N. C. 647. This rule is equally applicable in the absence of such circumstances, though the complainant was entirely without fault in the original suit. Hence a judgment will not be enjoined on the ground that the cause of action upon which it was based was one the enforcement of which was forbidden by statute: *National Fertilizer Co. v. Hinson*, 103 Ala. 532; nor because the court in the former action erroneously decided a pleading to be insufficient when it was sufficient, or erroneously admitted or rejected evidence, and thereby the party complaining was deprived of his cause of action or of defense. In all such cases, there is generally a remedy afforded by law either by moving for a new trial or prosecuting a writ of error or appeal, but, whether this be true or not, the loss of the cause of action or of defense through the error or mistake of the court is not regarded as a ground for the interposition of equity: *Hart v. Life Assn.*, 54 Ala. 495; *Reynolds v. Dunlap*, 94 Ga. 727; *Halcomb v. Kelly*, 57 Tex. 618; *Freeman on Judgments*, sec. 502. In the former action, reliance may have been had upon a statute which, if valid, supported the cause of action or of defense, and the court may have reached the conclusion that such statute was valid, while a decision subsequently made in the highest appellate tribunal may have declared it to be unconstitutional and void. This mistake of judgment on the part of the trial court in the for-

mer action is not one of the causes which can be successfully urged in equity as a ground of relief from a judgment: *Cassell v. Scott*, 17 Ind. 514; *New Orleans v. De la Cuesta*, 10 La. Ann. 724.

Newly discovered matters.—From the rule that all defenses must be presented in the original action, and that relief will not be granted to a litigant after a judgment who was negligent in presenting them, we are, perhaps, entitled to infer that the failure to present defenses which were not known may be excused, and that the discovery of them after judgment at a period too late to make them available in the original action may be a ground for relief against an unjust judgment. Here, the distinction between a new defense and new evidence must be kept in mind, for while isolated cases may be found indicating that the discovery of new evidence merely may be a ground for relief in equity (*Billups v. Sears*, 5 Gratt. 31; 50 Am. Dec. 105; *Deputy v. Tobias*, 1 Blatchf. 311; 12 Am. Dec. 243; *Bloss v. Hull*, 27 W. Va. 503), the general rule is, that if the defendant knew of the defense before the entry of judgment against him, it was his duty, not only to interpose it, but to employ all lawful methods, whether legal or equitable, of procuring the evidence necessary to establish it. If he fails in his evidence, he has a legal remedy by moving for a new trial on the ground of newly discovered evidence, but the time within which such motion may be made is usually limited by statute, and though there are instances in which such newly discovered evidence cannot be available other than by motion for a new trial, the rule remains applicable though the evidence is not discovered until too late to use it upon such motion. If the equity practice prevails, entitling the litigant to compel a discovery, he must resort to that remedy before judgment, if at all. Hence, the principle that equity will not enjoin a judgment because of newly discovered evidence merely is almost of universal application: *Norris v. Denton*, 2 Cal. 378; *Pollock v. Gilbert*, 16 Ga. 398; 60 Am. Dec. 732; *Vennum v. Davis*, 35 Ill. 568; *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243; *Campbell v. Briggs*, 3 Rob. (La.) 110; *Norton v. Woods*, 5 Paige, 249; *Bartholomew v. Yaw*, 9 Paige, 165; *Barker v. Simpson*, 1 Johns. Ch. 465; *Norris v. Hume*, 2 Leigh, 334; 21 Am. Dec. 631; *Green v. Massie*, 21 Gratt. 358; *Thurmond v. Durham*, 3 Yerg. 99; *Brown v. Swan*, 10 Pet. 497. On the other hand, if the party complaining of the judgment had no knowledge of the existence of some matter of defense in the original action, and his want of such knowledge is not inconsistent with reasonable diligence on his part, he may, after judgment, obtain relief therefrom in equity, particularly when such new matter was especially within the knowledge of his adversary, and the latter may be regarded as acting in bad faith in not disclosing it, or in taking judgment when he knew that a complete defense existed and that it was not presented because unknown to the defendant: *Cox v. Mobile etc. Ry.*, 44 Ala. 611; *Merrill v. San Diego etc. Nat. Bank*, 94 Cal. 59; *Chicago etc. Ry. v. Hay*, 119 Ill. 493; *Melick v. Tama C. B.*, 52 Iowa, 94; *Cairo etc. Ry. Co. v. Titus*, 28 N. J. Eq. 269; *Hart v. Bates*, 17 S. C. 35; *Turley v. Taylor*, 6 Baxt. 376; *Faulkner v. Harwood*, 6 Rand. 125; *Vathir v. Zane*, 6 Gratt. 246; *George v. Strange*, 10 Gratt. 499; *Ferrell v. Allen*, 5 W. Va. 43.

Therefore, though he might have, during the pendency of the former action, gone into chancery to compel a discovery from his adversary, and thereby obtained information of the matter constituting his defense, yet if he neither knew of such matter, nor had knowledge of any fact tending to lead him to the conclusion that matters were different from what they appeared to be, he is not adjudged negligent in not compelling a discovery prior to judgment, and is entitled to relief though it has been entered: *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243; *Winthrop v. Lane*, 3 Desaus. Eq. 323.

Exceptions to the rule that known defenses must have been presented at law.—It must be confessed that there are cases in which relief has been granted in equity against judgments at law though the defense might have been made in the original action, and there was no reason, or at least no sufficient reason, for not there presenting it, and where the defendant was at all times cognizant of his defense. We scarcely know whether to regard these cases as establishing exceptions to the general rule or as mere manifestations of judicial aberrations under the influence of peculiar circumstances. The cases inducing these aberrations were generally those in which the recovery of the plaintiff in the original proceedings involved the assertion of some cause of action, the enforcement of which was forbidden by statute or by general considerations of public policy, as where the judgment was for a gambling debt: *Mallett v. Butcher*, 48 Ill. 382; *Lucas v. Nichols*, 66 Ill. 41; *West v. Carter*, 129 Ill. 249; *Clay v. Fry*, 3 Bibb. 248; 6 Am. Dec. 654; *Emerson v. Townsend*, 73 Md. 224; *Lucas v. Waul*, 12 Smedes & M. 157; *Skipworth v. Strother*, 3 Rand. 214; *Woodson v. Barrett*, 2 Hen. & M. 86; 3 Am. Dec. 612; or upon an obligation void because offending the usury laws: *Case v. Davis*, 5 T. B. Mon. 390; *Frierson v. Moody*, 3 Humph. 561; *Brown v. Toel*, 5 Rand. 543; 16 Am. Dec. 759; or because given to suppress a prosecution for a felony: *Given's Appeal*, 121 Pa. St. 260; 6 Am. St. Rep. 795. In some of the states, statutes have been enacted so comprehensive in their terms as to leave no doubt that all judgments based upon gambling considerations may be relieved against in equity: *Pearce v. Rice*, 142 U. S. 28. In the absence of statutes of this character, there is no reason why a party sued upon a contract founded upon an immoral or unlawful consideration or a transaction forbidden by law should not be required to present his defense, and be precluded from seeking relief in equity from a judgment rendered against him because he did not choose to exhibit the true transaction out of which the claim arose: *New York v. Brady*, 115 N. Y. 509; *Heath v. Cobb*, 2 Dev. Eq. 187; *Given's Appeal*, 121 Pa. St. 260; 6 Am. St. Rep. 795; *Ruff v. Doty*, 26 S. C. 173; 4 Am. St. Rep. 709; *Lindsey v. James*, 3 Coldw. 377; *Buchanan v. Nolan*, 3 Humph. 63, 599; *Creath v. Sims*, 5 How. 192; *Sample v. Barnes*, 14 How. 70.

Another exception to the rule that every known defense must be presented in the original action, and if not there presented, or if so presented, and not supported by sufficient evidence, an injunction cannot be obtained against the judgment because of the existence of such defense, formerly existed, and perhaps still exists, in some

of the states, whereby a suit in equity to obtain relief is sustained whenever it appears from some receipt, release, or other writing that there can be no doubt that the judgment rendered at law is unjust, and this written evidence had been lost or for some other reason could not be produced at the former trial, but has since been found and its production made possible: *Willey v. McConnell*, 63 Ill. 238; *Gardiner v. Bowling*, 12 Gill & J. 381; *Kiser v. Winans*, 20 Ind. 428; *Florat v. Handy*, 35 La. Ann. 816; *Winthrop v. Lane*, 3 Desaus. Eq. 324; *Vathir v. Zane*, 6 Gratt. 246; *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424; *Mitford's Chancery Pleading*, 78; *Story's Equity Jurisprudence*, sec. 879. If a person, sued upon a cause of action which he knows he has discharged by payment, neglects to make his defense or chooses to waive it, equity will leave him to reap the consequences of his folly. The defense of payment, however, is justly favored in equity, and if the party against whom a judgment was entered was not informed of the existence of this defense in time to avail himself of it, or, being informed, was not able to procure the evidence requisite to establish it, and has not been guilty of laches, equity will usually interfere on his discovering after judgment some receipt, release, or other evidence establishing, beyond the possibility of reasonable controversy, that the judgment against him ought not to be enforced, because the demand upon which it is based had been fully satisfied prior to its entry: *Pearce v. Chastain*, 3 Ga. 226; 46 Am. Dec. 423; *McGehee v. Gold*, 68 Ill. 215; *Brown v. Leuhers*, 79 Ill. 575; *Ahl v. Ahl*, 71 Md. 555; *Foster v. Wood*, 6 Johns. Ch. 90; *Duncan v. Lyon*, 3 Johns. Ch. 356; 8 Am. Dec. 513; *Barker v. Elkins*, 1 Johns. Ch. 465; *Harvey v. Seashol*, 4 W. Va. 115.

Error or irregularity in the former action.—When the ground for relief in equity is not that the court or other tribunal in which the former action or proceeding was decided did not have jurisdiction to entertain some defense or to grant some relief to which the complainant was entitled, the complainant must found his claim to relief solely upon the allegation that for some reason his cause was not presented to the tribunal so as to be decided upon its merits, and that the failure to have it so presented was not due to any fault on his part. Nor is it always sufficient that he was free from fault. It must further appear that the cause from which he suffered is one which equity is competent to consider and against which it will grant relief. Of the causes from which he may have suffered without any fault on his part, and which may have produced an unjust judgment against him and on account of which he cannot obtain relief in equity, the most familiar illustration is to be found in those cases in which the judgment complained of was due to error or irregularity on the part of the court in the proceedings anterior to the judgment, or in reaching the conclusion which induced its rendition. It is not often that a mere irregularity in the proceedings affects the substantial rights of the parties to the extent of depriving either of a cause of action or of defense, and when irregularities are relied upon as grounds for relief from a judgment or other decision, it may, in the great majority of the cases, be a sufficient answer that the existence of the irregularity does not tend to establish that the judgment is unjust or that the prevailing litigant has se-

cured any advantage which it is against equity and good conscience for him to retain. Aside from this consideration, it is clear that courts of equity will not exercise any supervisory authority over the mere mode of proceeding in other tribunals, and hence will never enjoin a judgment on the ground of any mere irregularity, unless of so serious a character as to prove that the court pronouncing the judgment against which relief is sought was without jurisdiction: *Adams v. White*, 23 Fla. 352; *Stiles v. Knapp*, 2 Ga. Dec. 36; *Blanck v. Speckman*, 23 La. Ann. 146; *Gardner v. Jenkins*, 14 Md. 58; *Boyd v. Chesapeake*, 17 Md. 195; 79 Am. Dec. 646; *McIndoe v. Hazleton*, 19 Wis. 567; 88 Am. Dec. 701. Therefore, relief will not be granted in equity against a judgment because of irregularities in the form or service of process: *Waldrom v. Waldrom*, 76 Ala. 285; *Luco v. Brown*, 73 Cal. 3; 2 Am. St. Rep. 772; *Pico v. Sunol*, 6 Cal. 294; nor because of the misnomer of the defendant: *Genobles v. West*, 23 S. C. 154; or of the failure to appoint a guardian ad litem for an infant: *Drake v. Henshaw*, 47 Iowa, 291; *Myers v. Davis*, 47 Iowa, 325; or of a mistake in indorsing upon a copy of the summons an amount less than that stated in the original: *Bassett v. Mitchell*, 40 Kan. 549; nor because of defects in warrants of attorney upon which a judgment by confession was based: *Burch v. West*, 134 Ill. 258; or of the insufficiency of the findings: *Petalka v. Fitle*, 33 Neb. 756; nor because of the premature entry of the judgment: *White v. Crow*, 110 U. S. 183; or its entry as a judgment at law when the suit was in equity: *Tacoma etc. Co. v. Wolff*, 7 Wash. 478.

Errors in the former action.—When the court in the original action reaches an erroneous conclusion as to the merits of the controversy or as to any question occurring prior to the entry of judgment, the result may be, and usually is, in the abstract, against equity and good conscience. Respecting the great mass of errors of this character, some redress is offered by statutes conferring a right to move for a new trial and of appeal to some higher tribunal. In some instances, however, no right of appeal is given, and in others the error, mistake, or inadvertence may be that of the highest court itself, and, even theoretically, there is no remedy whatever. Of course, where there is a remedy by appeal or by a motion for a new trial, relief cannot be had in equity because of the familiar principle of equity jurisprudence, that equity will not interpose where there is an adequate remedy at law. But the fact that no statute has conferred any remedy by appeal or by motion for a new trial is not material, for it is universally conceded that a court of equity will not interfere on the ground that in its decision the court of law or other judicial tribunal whose judgment is sought to be enjoined, committed error, whether of law or of fact: *Sanders v. Albritton*, 37 Ala. 716; *Coffin v. McCollough*, 30 Ala. 107; *Ex parte Christian*, 23 Ark. 641; *Clopton v. Carlross*, 42 Ark. 560; *Wickersham v. Comerford*, 104 Cal. 494; *Dunn v. Fish*, 8 Blackf. 407; *Center Tp. v. Marion Co.*, 110 Ind. 579; *De Haven v. Covall*, 83 Ind. 344; *Meixell v. Kirkpatrick*, 28 Kan. 315; *Drake v. Henshaw*, 47 Iowa, 291; *Burke v. Wheat*, 22 Kan. 722; *Reynolds v. Horine*, 13 B. Mon. 234; *Methodist Church v. Mayor of Baltimore*, 6 Gill, 391; 48 Am. Dec. 540; *Fowler v. Lee*, 10

Gill & J. 358; 32 Am. Dec. 172; *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626; *Hazeltine v. Reusch*, 51 Mo. 50; *Cutter v. Kline*, 35 N. J. Eq. 534; *De Reimer v. De Cantillon*, 4 Johns. Ch. 85; *Donovan v. Finn*, Hopk. Ch. 59; 14 Am. Dec. 531; *Stockton v. Briggs*, 5 Jones, Eq. 309; *Grantham v. Kennedy*, 91 N. C. 148; *McDonall v. McDonall*, 1 Bail. Eq. 324; *Paddock v. Palmer*, 19 Vt. 581; *Jilsun v. Stebbins*, 41 Wis. 235; *McIndoe v. Hazleton*, 19 Wis. 567; 88 Am. Dec. 701; *Baker v. Morgan*, 2 Dow, 526; *Ludlow v. Ramsey*, 11 Wall. 581; *Tarver v. Tarver*, 9 Pet. 174; *Story's Equity Jurisprudence*, sec. 1572. To permit relief to be granted because of errors of this character would generally authorize the retrial in equity of the precise question already tried and decided in the original action, and this is never allowable: *Brick v. Burr*, 47 N. J. Eq. 189. Nor does the rule vary when the action was not properly presented because of some ruling in the course of the trial, as in the erroneous admission or rejection of evidence: *Moore v. Dial*, 3 Stew. 155; *Williams v. Carr*, 4 Colo. App. 368; *Galena etc. Co. v. Ennor*, 116 Ill. 55; *Vaughan v. Johnson*, 9 N. J. Eq. 173; *Greenfield v. Frierson*, 7 Heisk. 633; *Harrison v. Nettleship*, 2 Mylne & K. 423; or in deciding that property is subject to attachment which is by law exempt therefrom: *Barr v. Carpenter*, 16 R. I. 724. The error committed in the former action may be of a very unquestionable character and manifest from a mere inspection of the record. A court of equity, nevertheless, cannot make it the basis of relief. Hence, it will not entertain jurisdiction on the general allegation that the judgment was contrary to the law and the evidence: *De Haven v. Covalt*, 83 Ind. 344; *Landry v. Bertram*, 45 La. Ann. 48; *Neville v. Pope*, 95 N. C. 346; or was entered for a greater amount than was shown to be due: *King v. Vaughan*, 8 Yerg. 59; 29 Am. Dec. 104; as where too much interest was allowed: *Rogers v. Stokes*, 87 Tenn. 294; or that the complainant has been subjected to judgment in garnishment proceedings when nothing whatever was due from him to the principal debtor: *Gibson v. Cohen*, 85 Ga. 850. To the application of the rule that equity will not interfere because of errors of law, it is not essential that there should have been a contested trial in the former action. The judgment therein may have been entered upon default, but this will not entitle the defendant to question it in equity on the ground of error, unless he can show some good equitable reason why he did not present his defense in the original action: *Murdock v. DeVries*, 37 Cal. 527; *Turpin v. Thomas*, 2 Hen. & M. 139; 3 Am. Dec. 615. Attempts have sometimes been made to avoid the force of the rule by characterizing errors of the court in the original action or proceedings as mistakes due to inadvertence, press of business, and like causes whereby the court had been caused to overlook material evidence or for some other reason to render an incorrect decision. These attempts, however, have failed in inducing courts of equity to act upon the suggestion of the alleged frailties of the other judicial tribunals in the respect indicated: *Russell v. Slaton*, 38 Ga. 195; *Nichols v. Patterson*, 6 Humph. 394; *Dunham v. Douner*, 31 Vt. 249.

Error and irregularity being excluded from the grounds upon which relief may be had in equity, and all authority on the part of

courts of equity to supervise and correct the decisions of other judicial tribunals being disclaimed, the conclusion is inevitable that the only ground upon which relief can successfully be sought when it was the duty of the complainant to present his cause of action or of defense in the former proceeding is, that he was prevented from so presenting it either through some act of his adversary amounting to a fraud or by some other cause for which his adversary was not blamable, but which equity nevertheless deems sufficient to warrant relief.

Fraud on the part of the adversary may be alleged to be either in the cause of action itself or in its management or in both. It is only fraud in the management of the action or proceeding and by which the complainant was prevented from properly presenting and establishing his cause of action or defense which may be a ground for relief in equity. In the original action, it is the duty of the party to present his whole cause to the court, although his adversary has attempted to enforce a fraudulent cause of action or defense, and when judgment has once been entered, it is manifest that it cannot be ascertained whether the cause upon which it was granted was fraudulent or not, except by a retrial of the very issue presented in the former action or proceeding. Judgments are impeachable in equity "for those causes only which are extrinsic to the merits of the case and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for fraud relating to the merits between the parties. All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment. or by appeal": *Watts v. Frazer*, 80 Ala. 186; *Amador etc. Co. v. Mitchell*, 59 Cal. 168; *Zellerbach v. Allenberg*, 67 Cal. 296; *Payne v. O'Shea*, 84 Mo. 129; *Irvine v. Lyle*, 124 Mo. 361; *Griffith v. Reynolds*, 4 Gratt. 46; *Muscatine v. Missouri R. R. Co.*, 1 Dill. 536.

Undoubtedly decisions may be found which it is difficult or impossible to reconcile with the rules here stated, and in which relief was granted, though the remedy of the complainant for the injustice which he claims to have suffered ought to have been restricted to a motion for a new trial in the original action or proceeding. Thus bills in equity for new trials have been sustained where it was shown that the jury had been tampered with: *Lawless v. Reese*, 3 Bibb, 486; *Cummins v. Kennedy*, 4 J. J. Marsh. 645, where the party was "taken by surprise, and evidence was produced at the trial which he could have no reason to expect would be produced; *Sneed v. Town*, 9 Ark. 535; *Gibbs v. Hooper*, 2 Mylne & K. 353; 1 Chitty's Practice, 457; 3 Graham and Waterman on New Trials, 1531, where the cause was unexpectedly set for trial, at a special term of court, of which the complainant had no knowledge: *Joslin v. Coffin*, 5 How. (Miss.) 539, where the verdict of the jury was given under a mistake on their part; *Rust v. Ware*, 6 Gratt. 50; 52 Am. Dec. 100; *Woods v. Macrae*, Wythe, 78; *Cochran v. Street*, Wythe, 69; and where the judge at law was disqualified by reason of his interest: *Milnor & Co. v. G. R. R. & B. Co.*, 4 Ga. 385.

Perjury.—In perhaps a majority of cases the losing litigant deems himself the victim of false testimony, and even believes it to be will-

fully false, and that his adversary knew it to be so, and, so knowing, procured it to be given, and perhaps compensated the witness for his perjury. Therefore, if relief could be granted in equity against a decision in another judicial tribunal on the ground that it had been procured through perjury and subornation of perjury, courts of equity would be engaged a greater portion of their time in retrying questions of fact, on the suggesting that their trial in the original action had been affected by perjury. We have already given this question consideration in a note to this series of reports (note to *Pico v. Cohn*, 25 Am. St. Rep. 165-171), and shall content ourselves here by merely stating that while there are a few decisions which are defensible only on the theory that an allegation of perjury or subornation of perjury may be sufficient to invoke the action of a court of equity against a judgment claimed to be due thereto (*Laithe v. McDonald*, 7 Kan. 254; 12 Kan. 340; *Jordan v. Volkenning*, 72 N. Y. 300; *Peagram v. King*, 2 Hawks, 605; 11 Am. Dec. 793), these decisions are contrary to the great weight of authority upon the subject: *Woodall v. Moore*, 55 Ark. 22; *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159; *Fealey v. Fealey*, 104 Cal. 354; 43 Am. St. Rep. 111; *Greene v. Greene*, 2 Gray, 361; 61 Am. Dec. 454; *Gray v. Barton*, 62 Mich. 186; *Clark v. Lee*, 58 Minn. 410; *Colby v. Colby*, 59 Minn. 432; 50 Am. St. Rep. 420; *Folsom v. Folsom*, 55 N. H. 78; *Smith v. Lowry*, 1 Johns. Ch. 320; *Woodworth v. Van Buskerk*, 1 Johns. Ch. 432; *Ross v. Wood*, 70 N. Y. 8; *Friese v. Hummel*, 26 Or. 145; 46 Am. St. Rep. 610; *Nye v. Sochor*, 92 Wis. 40; 53 Am. St. Rep. 896; *United States v. Throckmorton*, 98 U. S. 61; *Nelson v. First Nat. Bank*, 70 Fed. Rep. 526.

Fraudulent concealment.—The rule that a court of equity will not relieve from a judgment for fraud in the cause of action itself, and where the propriety of granting such relief depends upon the retrial of the very question tried and decided in the former action, is subject to some exceptions, one of the most important of which exists when the prevailing litigant has been guilty of what is commonly known as fraudulent concealment of the existence of some matter of defense which, if known to his adversary and established by the evidence, must have resulted in a judgment different from that actually pronounced in the former action. There are cases which speak in general terms of concealment of facts as a ground for relief in equity against a judgment at law: *Noyes v. Loeb*, 23 La. Ann. 13; 24 La. Ann. 48; *Fish v. Lane*, 2 Hayw. (N. C.) 522; *Spencer v. Vigneaux*, 20 Cal. 442. We apprehend there must be something more than mere concealment, and that the losing litigant cannot ordinarily find relief from a judgment against him by proving that his adversary knew, but did not disclose, facts which, if known, would have prevented the judgment. We do not understand that the parties to a litigation commonly occupy toward each other the relation of fiduciaries, and therefore, that neither can proceed until or unless he has made a full disclosure to the other of the facts within his knowledge which may affect the decision of their controversy. If they do, however, occupy such a relation, there can be no doubt of the propriety of the application of the rule that neither of them can profit from the concealment of facts which it was his duty to disclose to the

other. Hence, if in a controversy between an administrator or executor and the estate represented by him, or between a trustee and his cestui que trust, a judgment is rendered against the beneficiary through his ignorance of facts which the administrator or trustee ought to have disclosed, and the existence of which the beneficiary did not suspect, relief should certainly be granted him in equity: *Pratt v. Northam*, 5 Mason, 95; *Mitchell v. Shaneberg*, 149 Ill. 420.

Thus, if a judgment is obtained in ejectment against a wife in a suit based upon a deed made by a trustee of her estate, and which she supposes was made to secure advances for the use of the estate, she is entitled to be relieved therefrom in equity, if she discovers, after the entry of the judgment, that no moneys were advanced to her trustee or for the use of the estate, and that the trust deed was given for debts due from her husband, and the judgment against her was procured by the combination and confederation of her husband and the person to whom the trust deed was made: *Capital Bank v. Rutherford*, 70 Ga. 57. So there may doubtless be other cases in which, though the parties did not occupy a fiduciary relation toward each other, yet the prosecution of the action or defense may in itself amount to a fraud, and the concealment of facts from the adverse party who has no means of discovering their existence is in furtherance of a general scheme of fraud, the fruits of which courts of equity will not permit to be reaped even though the fraudulent litigant has secured the aid of a judgment at law. This rule was applied in one instance in which it was found, after a recovery had been had at law upon a policy of insurance, that the loss of the insured property was due to its destruction by the plaintiff in the action (*Ocean Ins. Co. v. Fields*, 2 Story 59), and in another case in which it appeared that just prior to the entry of judgment the plaintiff had received full payment of the amount sued for from one of the codefendants in the action, and this fact was concealed from another of the defendants against whom judgment was taken: *Reed v. Harvey*, 23 Ark. 44. The rule is thus stated in an early equity case: "As to relief against verdicts for being contrary to equity, those cases are, when the plaintiff knew the fact of his own knowledge to be otherwise than what the jury found by their verdict, and the defendant was ignorant of it at the trial, as where the plaintiff's action might be for a debt, etc., and the defendant after the verdict discovers a receipt for the very demand in the action, here the court would relieve": *Williams v. Lee*, 3 Atk. 223. In a recent case, it appeared that judgment was recovered against a municipality for a sum alleged to be due upon bonds theretofore issued by it, and that such bonds had already been reduced to judgment in another case in favor of another plaintiff, the true owner thereof, but were afterward stolen from the archives of the court, and made the basis of the second suit and recovery; that the nominal plaintiff in the second suit and his attorney were fictitious persons; that the municipality, its agents, and attorneys, were entirely ignorant of the fraud that was being practiced upon the municipality, and that they had no knowledge of any defense to the suit at the time the second judgment was entered; that on the day the cause was called for

trial, an attorney appeared in court, exhibited the bonds sued upon to the city attorney, who, seeing them to be genuine, suspecting no fraud, and knowing of no defense, suffered judgment to be taken thereon. The defense to the suit to enjoin the assertion of the second judgment was made by an assignee thereof. The court held that such assignee accepted the judgment subject to all defenses which could have been asserted against the assignor, and, therefore, if the circumstances were such as to entitle the complainant to an injunction against the original judgment creditor, they were equally available against his assignee, and, in determining that the relief prayed for should be granted, the court stated the rule upon the subject to be as follows: "The general rule which holds a party negligent who fails to develop every fact which would defeat a recovery upon an iniquitous demand is a reasonable rule, but it has its qualifications and reasonable limitations, and we hold that where a judgment was obtained from the mala fides of the plaintiff who at the time knew that the judgment was contrary to the facts and truth; and where it further appears that the defendant was at the time ignorant of the existence of the very facts which make the judgment unconscionable, and where there was nothing in the circumstances of the litigation or the trial calculated to arouse the suspicion of a prudent man to the fact of a fraud being practiced, a court of equity will interpose and restrain proceedings upon such a fraudulent judgment; and the fact that the defense could have been made at law, and that the evidence was accessible, will not, in such a case, be such negligence as to restrain the exercise of the jurisdiction of this court": *Taylor v. Nashville etc. R. R. Co.*, 86 Tenn. 228, 241. In harmony with the rule just stated, relief has been granted against judgments at law procured through the use of forged deeds, the persons against whom they were used having at the trial no cause to suspect them of being forgeries, and therefore being guilty of no negligence in not presenting that question at such trial: *Dunn v. Miller*, 96 Mo. 324; *Marshall v. Holmes*, 141 U. S. 589. It seems to be essential that the party failing to disclose a fact which, if disclosed, would have defeated his right of recovery, must have been actuated by a fraudulent purpose. Hence, where it was sought to obtain relief against the distribution of an estate to one claiming to be the wife of the decedent, on the ground that a divorce which had been entered prior to her marriage to him was void, and therefore that she was guilty of fraud during the settlement of the estate in representing herself to be the lawful widow of the decedent, such relief was denied, upon the ground that the woman against whom it was sought undoubtedly believed such divorce to be valid, and that whether it was valid or not was a question of law rather than of fact, and one of which she could not be expected to have any knowledge: *Thomas v. Thomas*, 88 Wis. 88. In some instances, relief has been granted on the ground of concealment, though it is clear that the complainant, by the exercise even of slight diligence, would have discovered and been able to present his defense in the original action. Thus where a plaintiff, though he knew his judgment to be satisfied, commenced an action thereon to set aside a

conveyance as having been made in fraud of his rights, and obtained a decree, the defendants afterward discovered a satisfaction filed among the papers in the case before the commencement of the second suit, though it was not marked upon the docket. They then commenced a suit to set aside the decree annulling their conveyance, and were granted relief, on the ground that by the examination of the docket where the entry of satisfaction ought to have been marked they had been sufficiently diligent to entitle them to protection from one asserting a claim which he knew to have been fully paid: *Shinkle v. Letcher*, 47 Ill. 216. In another case, where it appeared that a certain sum was due to plaintiff's intestate for his services according to a written contract, he, at the trial of the action at which the defendants were unable from various causes to be present, "fraudulently claimed to recover against them upon a quantum meruit, withholding from the court evidence as to the contract for compensation by a fixed percentage, which he knew by letters of his intestate in his possession to be the true basis for the judgment," and that by such fraud he succeeded in obtaining judgment for a much larger amount than was actually due. It was held that these facts constituted a sufficient ground for the interposition of equity: *Stanton v. Embry*, 46 Conn. 65. The relief in these cases was, perhaps, granted as much upon the ground of the plaintiff's proceeding in the absence of the defendants when they had no opportunity to protect themselves as upon his fraudulent concealment of the true facts of the case. In another instance, where a judgment was granted during the absence of the defendant for a sum claimed to be due for the board of his wife, relief was granted upon showing that it was the duty of the plaintiff under an agreement to furnish such board, and that he, at the time the action was commenced, had funds of the defendant in his hands with which to make payment for the board so furnished: *Moore v. Gamble*, 9 N. J. Eq. 246.

Fraud in the management of an action.—Where the fraud is not in the cause of action, but consists of some act whereby the successful litigant prevents his adversary from presenting the latter's cause of action or defense, there is no doubt that relief may be granted in equity: *Hayden v. Hayden*, 46 Cal. 332; *Carrington v. Holabird*, 17 Conn. 530; *Brown v. Thornton*, 47 Ga. 474; *Dugan v. McGann*, 60 Ga. 353; *Ogden v. Larabee*, 57 Ill. 389; *Schroer v. Pettibone*, 163 Ill. 42; *Hogg v. Link*, 90 Ind. 346; *Young v. Tucker*, 39 Iowa, 600; *Cowin v. Toole*, 31 Iowa, 513; *Hahn v. Hart*, 12 B. Mon. 426; *Burch v. Scott*, 1 Bland, 112; *Kent v. Ricards*, 3 Md. Ch. 392; *Street v. Alden*, 62 Minn. 160; post, p. 632; *Ward v. Quinlivan*, 57 Mo. 425; *Bresnehan v. Price*, 57 Mo. 422; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Blinsse v. Barker*, 13 N. J. L. 263; 23 Am. Dec. 720; *Munn v. Worrall*, 16 Barb. 221; *Corwithe v. Griffin*, 21 Barb. 9; *Whittlesey v. Delaney*, 73 N. Y. 571; *Stevens v. Central Nat. Bank*, 144 N. Y. 50; *Lockwood v. Mitchell*, 19 Ohio, 448; 53 Am. Dec. 438; *Greene v. Haskell*, 5 R. I. 447; *Crank v. Flowers*, 4 Heisk. 629; *Polindexter v. Waddy*, 6 Munf. 418; 8 Am. Dec. 749. We cannot, of course, undertake to specify all the fraudulent acts of this character which may entitle the person against whom they were employed to

relief. Such acts may be of infinite variety. It is sufficient, as against any of them, to obtain relief from a judgment produced thereby to show that by such act the prevailing party prevented his adversary from fairly presenting his case in the original action, whereby an unjust judgment was obtained. The prevention of the making of a proper defense may have been brought about by a false return of the service of process: *Peek etc. Co. v. Pella etc. Co.* 19 Colo. 222; *Wilson v. Montgomery*, 14 Smedes & M. 205; or by procuring it to be served by publication, and without depositing a copy of the summons addressed to the defendant, on the allegation that his place of residence was unknown to the plaintiff: *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; or by fraudulently procuring a letter of attorney purporting to authorize the confession of a judgment: *Johnston v. Loop*, 2 Tex. 331; or by inducing the attorney employed by the defendant to prove recreant to his client: *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Haverty v. Haverty*, 35 Kan. 438; *Beck v. Bellamy*, 93 N. C. 129. The fraud is often effected by the collusion or conspiracy of two or more persons, as where they conspire to prevent the appearance of a party at the trial: *Douthit v. Douthit*, 133 Ind. 26; or where they are charged with the duty of representing a party and by collusion conceal from the court his interest in the controversy or his defense or cause of action: *Griswold v. Hicks*, 132 Ill. 494; 22 Am. St. Rep. 549; *First etc. Church v. Syms*, 52 N. J. Eq. 545; in all of which cases he is entitled to relief: *Mayberry v. McClurg*, 51 Mo. 256; *Hardy v. Broadus*, 35 Tex. 668. The rule that a party may be relieved from a decision procured by the fraud of his adversary is not restricted to judgments at law, but applies to almost every determination that may be made as the result of judicial proceedings. Hence, relief will be granted if a defendant has been prevented from availing himself of his discharge in bankruptcy by any trick, fraud, or device of the plaintiff: *Starr v. Hackart*, 32 Md. 267; *Manwarring v. Kouns*, 35 Tex. 174; *Park v. Casey*, 35 Tex. 536; *Greenleaf v. Maher*, 2 Wash. C. C. 44; or has been subjected through like means to a decree of divorce: *Bradford v. Abend*, 89 Ill. 78; 31 Am. Rep. 67; *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393; *True v. True*, 6 Minn. 458; *Adams v. Adams*, 51 N. H. 458; *Boyd's Appeal*, 38 Pa. St. 241; although the party obtaining the fraudulent decree has, in reliance thereon, contracted another marriage: *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, 46 Iowa, 648; 26 Am. Rep. 179.

It has been said in one case that "whilst equity may set aside a judgment for fraud, it must be fraud in the plaintiff in judgment or his counsel or agents." In the case in which this language was used, however, there does not appear to have been any fraud upon the part of any person. The court in which the proceeding was pending had granted a postponement to plaintiff's counsel, and had then stated to counsel for the defendant that he would notify him when the cause would be called for further hearing, but, forgetting to keep this promise, the judge took up and disposed of the case without notice to the defendant, who subsequently sought relief from the judgment by a bill in equity to set it aside. The relief

was denied really upon the ground that the complainant had a complete remedy at law by motion to set aside the judgment, and that instead of pursuing this plain remedy, he had frittered away his time by various proceedings and requests until six years had elapsed after the entry of the decision against which he complained, and that he had, therefore, been guilty of such laches that a court of equity would not interpose in his behalf: *Morrow v. Morris*, 76 Ga. 733. If there is fraud upon the part of the court or judge, there seems to be no reason why it does not constitute as complete a ground for relief as if the prevailing party had been guilty thereof. Such fraud can but rarely occur without a conspiracy between the judge and the party benefited, and, even if there be not such conspiracy in the beginning, the party benefited ought to be regarded as joining therein when, being informed thereof, he seeks to retain its advantage. Hence, relief has been granted on account of the fraudulent conduct of a magistrate in giving a litigant a written statement that a suit was dismissed, and afterward entering judgment against him: *Wagner v. Shank*, 59 Md. 313; or after setting aside a judgment, vacating the order setting it aside, and giving no notice thereof until the time for appeal from the original judgment had expired, though in this latter case it was said that there might also have been a remedy by certiorari: *Merriman v. Walton*, 105 Cal. 403; 45 Am. St. Rep. 50.

Taking judgment contrary to some agreement or representation. One of the most frequently recurring forms of fraud on the part of one litigant against the other, entitling the latter to relief in equity against the judgment finally entered, is the making of some agreement or representation for the purpose of preventing an appearance or defense in the original action, and reliance upon which has had the effect intended. In no case of this character will the party in the wrong be suffered to retain its fruits: *California etc. Co. v. Porter*, 68 Cal. 369; *Chambers v. Robbins*, 28 Conn. 552; *Baker v. Redd*, 44 Iowa, 179; *Kent v. Ricards*, 3 Md. Ch. 392; *Murphy v. Smith*, 86 Mo. 333; *Keeler v. Elston*, 22 Neb. 310; *Dandridge v. Harris*, 1 Wash. (Va.) 326; 1 Am. Dec. 465; *Holland v. Trotter*, 22 Gratt. 136. In many instances, the parties out of court have agreed upon some compromise of their controversy, and in some instances payment of the sum fixed by such compromise has been accepted, and nevertheless one of the parties, without informing the court of the compromise, has taken judgment against his adversary in his absence. In all such cases, relief will be granted: *Pearce v. Olney*, 20 Conn. 544; *Gates v. Steele*, 58 Conn. 316; 18 Am. St. Rep. 268; *Rogers v. Gwinn*, 21 Iowa, 58; *Neal v. Dicks*, 72 Ind. 374; *Edmonson v. Mosby*, 4 J. J. Marsh, 497; *Wierich v. De Zoya*, 2 Gilm. 385; *Street v. Alden*, 62 Minn. 160; post, p. 632; *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152; *Dobson v. Pearce*, 1 Abb. Pr. 97; *Lazarus v. McGuirk*, 42 La. Ann. 194; *Hibbard v. Eastman*, 47 N. H. 509; 93 Am. Dec. 467. A like result must follow where, though there is no compromise, the plaintiff admits or states to the defendant that he has no cause of action against him, that the action will be dismissed, and in substance, that the defendant need not employ an attorney or pay any

further attention to it: *McLeran v. McNamara*, 55 Cal. 508; *Purvlance v. Edwards*, 17 Fla. 140; *Johnson v. Unversaw*, 30 Ind. 435; *Stone v. Lewman*, 28 Ind. 97; *Greenwaldt v. May*, 127 Ind. 511; 22 Am. St. Rep. 660; *Keeler v. Elston*, 22 Neb. 310; *Cadwallader v. McClay*, 37 Neb. 359; 40 Am. St. Rep. 496; *Jarman v. Saunders*, 64 N. C. 367. So the plaintiff, without promising to dismiss the action, may assure the defendant that the judgment shall be so restricted in its terms as not to prejudice him personally, as where the statement is made to him that he has been sued pro forma, because he was supposed to be a necessary party: *Broadbudd v. Broadbudd*, 3 Dana, 536; or that being sued to foreclose a mortgage or other lien or for the possession of property, he is assured that a personal judgment will not be taken against him, and that no relief will be sought except such as is confined to the property described in the complaint: *Brake v. Payne*, 137 Ind. 479; *Wood v. Hughes*, 138 Ind. 179; *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467; in all of which cases plaintiff will not be permitted to assert a judgment taken in violation of his representation or agreement. The plaintiff, instead of agreeing to dismiss the action, may stipulate that if defendant does not defend, but permits judgment to be entered, that the effect of the judgment shall be restricted in some particular, or that the plaintiff will not, notwithstanding its entry, do specified acts, in which event he will, notwithstanding the entry of the judgment, be enjoined from enforcing it, unless he will perform the acts which he has agreed to do or permit the judgment to have the restricted operation upon the assurance of which its entry was permitted. This rule has been applied against a plaintiff who agreed that if the defendant would withdraw an equitable plea, the plaintiff would do the equity set up by the plea: *Markham v. Angier*, 57 Ga. 43; or that he would enter a satisfaction of judgment upon the payment of a sum designated: *Thompson v. McLaughlin*, 91 Cal. 313; or that if there was any mistake in the judgment he would nevertheless correct it: *Shufeldt v. Gandy*, 25 Neb. 602. Escape from agreements of this character has sometimes been sought on the ground that such agreements were void because made on Sunday or were oral, when the law or some rule of court required all stipulations to be in writing. It has generally, if not universally, been regarded as a sufficient answer to this claim that it is not material whether the agreement itself was valid or not, if it is shown to have been employed by the successful litigant as a means of effecting a fraud upon his adversary and preventing the interposition and establishment of a defense which would otherwise have been made: *Gulf etc. Ry. Co. v. King*, 80 Tex. 681; *Blakesley v. Johnson*, 13 Wis. 530. Though no representation is made to a defendant inducing him not to make his defense, yet the plaintiff may seek to perpetrate a fraud upon him by bringing on the action without his knowledge and at a time when he knows the defendant has reason to expect the trial of it will not be had. Thus it appeared in one case that a justice of the peace had in the morning announced to a defendant that the trial of the case would not proceed because of the illness of such justice, and that but for this announcement the defendant would have been pres-

ent at the hour fixed for the trial, and that the plaintiff, knowing that the defendant had left the court with the belief that his cause would not be called, had afterward returned and induced the justice to proceed therewith in the absence of his adversary. In this case, while the plaintiff had not caused the justice of the peace to make the statements inducing the defendant to forego presenting his defense at the appointed time, he had in effect adopted such statements, and employed them for an unconscionable purpose, and had thus brought himself within the rule that no one shall retain an advantage at law secured by his own fraud or misrepresentation: *Miles v. Jones*, 28 Mo. 87.

Plaintiff cannot take Advantage of His own Wrong.—The plaintiff may do some act or be guilty of some neglect because of which the defendant is precluded from making a defense. The act or neglect of the plaintiff need not necessarily have been fraudulent in its inception or purpose. It would, however, be a fraud for him to urge his own wrongful act or neglect as a means of obtaining or retaining an unconscionable advantage over another, and, should he urge it, equity will not permit him to prevail. This rule was applied where the plaintiff, in a suit to quiet title, claimed under a tax judgment and sale, and it was shown that he was a court commissioner charged by law with the duty of examining whether process in the tax cases had been properly served, and that though such process had not been served, he had drafted a decree reciting the due service thereof. The court said: "It is immaterial that he acted, as the court finds, in good faith, and without any fraudulent intent. He has, through his own laches or neglect, obtained an unconscionable advantage over the defendants, against which a court of equity will afford relief. It was through his fault that the decree was obtained without any service of process, and it would be against good conscience to allow him to profit by his own wrong": *Martin v. Parsons*, 50 Cal. 501; 49 Cal. 94.

Mistake, Accident, and Surprise are familiar grounds upon which to invoke the exercise of the jurisdiction of courts of equity, and there is no doubt that a judgment may, in a proper case, be relieved against because of any of these grounds, where its consequence has been that a party without fault on his part has been deprived of, or caused not to present for consideration, some cause of action or some matter of defense: *Dunlap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143; *Kayser v. Shark*, 59 Md. 313; *Martin v. Carpenter*, 2 G. Greene, 131. If the mistake is one occurring in the progress of the cause, whereby the party lost some right, as where, through its influence, he failed to appear or to plead in due time, or to do some other act necessary to the preservation of some right, or to present his cause to some appellate tribunal, there is no difficulty in affirming the jurisdiction of equity to relieve him from the consequences of such mistake. Among the mistakes of this character from which relief has been granted are the following: A mistake on the part of the judge in writing his certificate to a bill of exceptions: *Kohn v. Lovett*, 45 Ga. 180; a mistake of the judge in failing to mark the name of counsel for defendant on a docket, in consequence of which judgment was entered by default: *Brewer v. Jones*, 44 Ga. 71; a mis-

take of the clerk in entering a judgment: *Partridge v. Harrow*, 27 Iowa, 96; 99 Am. Dec. 643; as where he incorrectly described real property in a judgment of foreclosure or in partition: *Snyder v. Ives*, 42 Iowa, 157; *Smith v. Butler*, 11 Or. 46; a mistake of an attorney arising from incorrect information given him with respect to the terms of the court, resulting in his not appearing for the defendant in proper time to present his defense: *County of Buena Vista v. I. F. & S. C. R. R.*, 49 Iowa, 657; a mistake of the clerk in entering a cause on appeal in an unusual place in the docket, whereby it could not be found by an attorney employed who represented the defendant, resulting in the taking of a judgment against him by default: *Seymour v. Miller*, 32 Conn. 402; or in taking an improper bond: *Saunders v. Jennings*, 2 J. J. Marsh, 513; *Oliver v. Pray*, 4 Ohio, 175; 19 Am. Dec. 600; or in making up a record (*Collyer v. Easton*, 2 Mo. 145), whereby a right of appeal was lost. But it is obvious that a court of equity cannot, under pretense of a mistake, revise a judicial decision where the remedy of the parties for any error is by some appellate proceeding. There have been cases in which this consideration was probably overlooked and relief given involving the merits of the original controversy: *Chase v. Manhardt*, 1 Bland, 350; *Ford v. Ford*, Walk. 505; 12 Am. Dec. 587; *Drew v. Clarke*, Cooke, 373; 5 Am. Dec. 698. In several instances, relief was granted because of a mistake in computing the amount due on a promissory note, some of the mistakes being apparently attributable to counsel, and others to the court or jury: *Sidener v. Coons*, 83 Ind. 183; *Partridge v. Harrow*, 27 Iowa, 96; 99 Am. Dec. 643; *Barthell v. Roderick*, 34 Iowa, 518; *Walker v. Villavaso*, 26 La. Ann. 42; *Boone v. Miller*, 16 Mo. 457; *Wilson v. Boughton*, 50 Mo. 17; *Cohen v. Dubose*, 1 Harp. Eq. 102; 14 Am. Dec. 709; *Rust v. Ware*, 6 Gratt, 50; 52 Am. Dec. 100. Where such a mistake appears from the record, it may, in some instances, be corrected by a motion to amend the judgment entered to conform it to the record. In all other cases, it would seem to be extremely difficult, in an independent proceeding, to determine whether the alleged injustice was due to the mistake or to the error of the court, and, therefore, equity can rarely exercise jurisdiction without undertaking to revise the judgment of another tribunal for error, and this, as we have already shown, it professes never to do. In one case, relief was granted to a litigant because of a mistake of law arising in the course of judicial proceedings by his relying upon a statute afterward decided to be unconstitutional: *Cobbs v. Colman*, 14 Tex. 594. Doubtless it is the better policy to encourage all citizens to respect statutes until their constitutional validity has been judicially declared, and therefore we can but lightly condemn the court for relieving a party who has lost some right by his reliance upon a statute subsequently declared to be invalid. In all other cases, it seems to be well established that a court of equity will never interpose to enjoin a judgment on the ground of a mistake or ignorance of the law: *Dickerson v. Commissioners*, 6 Ind. 128; 63 Am. Dec. 373; *Schricker v. Field*, 9 Iowa, 366; *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626; *Hubbard v.*

Martin, 8 Yerg. 298; Meem v. Rucker, 10 Gratt. 506; Richmond v. Shippen, 2 Pat. & H. 327; though it may be attributable to an opinion or suggestion of the judge before whom the cause was pending. Risher v. Roush, 2 Mo. 95; 22 Am. Dec. 442. In one case, relief was granted from a judgment because of a mistake in the preparation of the pleadings in a former action. That action was a writ of entry against the complainant, and was intended to try the title to a particular parcel of real property, but by a mistake in the pleadings there was included in the description a parcel not in controversy between the parties, and a judgment was finally entered which, if permitted to stand, amounted to a judicial determination of the title to the parcel about which there was no controversy. The litigant in whose favor the judgment was discovered the mistake at or about the time of its rendition, but purposely kept silent in reference thereto until a year after such entry and until it was too late to procure relief on the original action. The court, in granting relief, said: "Active fraud on the part of the defendant is not essential to the relief sought. It is enough that the judgment was the result of a mistake of fact on the part of the plaintiff; that he is deprived of his right of review by the failure seasonably to discover the real character of that judgment, which, though known to the other party, had been purposely concealed from him; and that, without fault or negligence on his part, he is dispossessed of property without an opportunity to maintain his title thereto. To enforce, as an absolute estoppel, such a judgment would be contrary to equity and good conscience. There being no other remedy now open to him, he may have relief in chancery by injunction: 2 Story's Equity Jurisprudence, sec. 887; Adams' Equity, 197; 2 Daniell's Chancery Practice, 4th Am. ed., 1625; Kerr on Injunctions, 23; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Carrington v. Holabird, 17 Conn. 530; Barnesly v. Powel, 1 Ves. Sr. 284, 289; Jarvis v. Chandler, 1 Turn. & R. 319. We do not undertake, in this suit to determine the true boundary between the parties. The relief granted extends no farther than to remove from the plaintiff the estoppel which the defendant seeks to set up against him, derived from pleadings and a judgment thereon which were founded in misapprehension and mistake of fact. Against any use of the record for that purpose there should be a perpetual injunction": Currier v. Esty, 110 Mass. 536.

In addition to mistake, there are other causes which, though not due to any fraud or mistake of the prevailing party, are, nevertheless, sufficient to warrant the interposition of equity to prevent the enforcement of an unjust judgment or decree. These other causes include sickness, accident, surprise, and all other causes by reason of which, and without any fault on his part, other than error on the part of the court, the losing party is unable to present his cause of action or of defense: Kersey v. Rash, 3 Del. Ch. 321; Rice v. Railroad Bank, 7 Humph. 39; White v. Washington, 5 Gratt. 645. Among these causes for relief the following may be enumerated: Illness of the party or his counsel, or other accident preventing either from attending the trial or doing some other act essential to the defense of the action: Pharr v. Reynolds, 3 Ala. 521; Clifton v.

Livor, 24 Ga. 91; **Brooks v. Whitson**, 7 Smedes & M. 513; **Hord v. Dishman**, 5 Call, 279; **Crim v. Handley**, 94 U. S. 652; or the taking up of a cause during the absence of a party and his counsel after a general order had been made continuing all contested cases to another term of the court: **Jones v. Kincaid**, 5 Lea, 677; going to trial upon the assurance of the payee of a note alleged to be usurious that he had sold it, and could be examined as a witness, who, when called as such witness, testified that he had not disposed of it, and refused to testify upon the subject of usury: **Poast v. Boardman**, 10 Paige, 580; failure of the party to appear at the trial owing to his being informed that the cause had been disposed of on demurrer and his not being notified of a subsequent appeal: **Bibend v. Kreutz**, 20 Cal. 110.

Many of the cases in which relief has been granted because of accident have related to proceedings subsequent to the entry of the judgment, and the accident complained of has been one which destroyed the remedy by way of appeal or motion for a new trial. The authorities affirm with substantial, and perhaps with absolute unanimity that any accident of this character whereby a party without any lack of diligence on his part has been deprived of his remedy warrants the interference of equity, provided it appears from all the circumstances that but for such accident the remedy might have been prosecuted with success. The accident relied upon has most frequently been the illness or death of the presiding judge before he could settle a bill of exceptions or hear or dispose of some motion, or the unexpected adjournment of the court and the dispersion of the judges, and when, from any of these causes, the right of appeal has been lost, the party benefited by it has not been allowed to retain his advantage: **Leigh v. Armor**, 35 Ark. 123; **Valentine v. Holland**, 40 Ark. 338; **Harkey v. Tillman**, 40 Ark. 561; **Little Rock etc. Ry Co. v. Wells**, 61 Ark. 354, ante, p. 216; **Kansas etc. Co. v. Fitzhugh**, 61 Ark. 341; ante, p. 211; **Foushee v. Lea**, 4 Call, 279; **Pickett v. Morris**, 2 Wash. (Va.) 255; **Knifong v. Hendricks**, 2 Gratt. 212; 44 Am. Dec. 385. In cases of this class it has not been possible for courts of equity to act without considering whether errors of law had been committed in the original action and had contributed to the rendition of the judgment, and whether or not the judgment as rendered was unjust. The party losing the right to present his appeal or his motion for a new trial by some accident must, in addition to establishing the loss and the accident, show that but for it he would, or at least should, have escaped from the judgment. It therefore becomes indispensable, in a suit in equity to enjoin a judgment for this reason, to show that the grounds of the appeal or motion were such that a new trial ought to have been granted or the judgment appealed from reversed: **Little Rock etc. Ry. Co. v. Wells**, 61 Ark. 341; ante, p. 216; **Galbraith v. Barnard**, 21 Or. 67; **Overton v. Blum**, 50 Tex. 417; **Ratto v. Levy**, 63 Tex. 278.

Want of Jurisdiction.—A court of law or other judicial tribunal may proceed to render a judgment in a cause where it has no jurisdiction over the person of the defendant or of the subject matter of the action. There is no doubt that a court of equity will generally relieve against such a judgment, though in some instances it will re-

fuse to act either because there is an adequate remedy at law, or because the person against whom relief is sought is an innocent purchaser, or for some other reason his equities are of as high a character as those of the complainant. Where a court has proceeded in the original action without obtaining jurisdiction over the person of the defendant, its action may have been due either to the fraud of the plaintiff or to some mistake or accident. Upon principle, it does not seem to be material how the court happened to take its unauthorized action, or whether the plaintiff was free from fault or not, provided the failure to serve the process on the defendant was the cause of his not appearing and defending in the action, and has resulted in a judgment against him which it is against equity and good conscience to permit the enforcement of: *Crafts v. Dexter*, 8 Ala. 767; 42 Am. Dec. 666; *Stubbs v. Leavitt*, 30 Ala. 352; *Robinson v. Reid*, 50 Ala. 69; *Ryan v. Boyd*, 33 Ark. 778; *Martin v. Parsons*, 49 Cal. 95; *San Juan Co. v. Finch*, 6 Colo. 214; *Wilson v. Hawthorne*, 14 Colo. 530; 20 Am. St. Rep. 290; *Jeffery v. Fitch*, 46 Conn. 61; *Hickey v. Stone*, 60 Ill. 458; *Weaver v. Poyer*, 79 Ill. 417; *Allen v. Hickey*, 53 Ill. App. 437; *Connell v. Stetson*, 33 Iowa, 146; *Arnold v. Hawley*, 67 Iowa, 313; *State Ins. Co. v. Waterhouse*, 78 Iowa, 674; *Bramlett v. McVey*, 91 Ky. 151; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *Crawford v. Redus*, 54 Miss. 100; *Duncan v. Gerdline*, 59 Miss. 550; *Cobbey v. Wright*, 34 Neb. 771; *Armstrong v. Cheshire*, 2 Dev. Eq. 234; 24 Am. Dec. 273; *Ingle v. McCurry*, 1 Heisk. 26; *Tyler v. Walker*, 1 Heisk. 734; *Caruthers v. Hartsfield*, 3 Yerg. 366; 24 Am. Dec. 580; *Cook v. Burnham*, 32 Tex. 129; *Smith v. Deweese*, 41 Tex. 595; *Glass v. Smith*, 66 Tex. 548; *Bender v. Damon*, 72 Tex. 92; *Galveston etc. Ry. Co. v. Ware*, 74 Tex. 47. The rule applies to judgments entered against corporations upon service of process upon some person supposed to be a proper officer or agent to be served, when he in fact was not such: *Grand etc. Co. v. Schirmer*, 64 Ill. 106; *State etc. Co. v. Waterhouse*, 78 Iowa, 674; *Chamber v. King Mfg. Co.*, 16 Kan. 270; *Wagner v. Shank*, 59 Md. 313; *Southern etc. Co. v. Craft*, 43 Miss. 508; *Gulf etc. Co. v. Rawlins*, 80 Tex. 579. If the want of jurisdiction does not appear on the record, the affirmation of a judgment on appeal does not constitute an impediment sufficient to deprive the party of relief in equity, for the obvious reason that the remedy by appeal was necessarily inadequate: *Wilson v. Montgomery*, 14 Smedes & M. 205. While a suit in equity to enjoin a judgment at law is not regarded as a direct, but as a collateral attack, yet the rules applicable to collateral attacks are not in all respects applicable to it. In an ordinary collateral attack, it is not permissible to contradict judicial recitals or to disprove official returns of the service of process. In equity, such recitals may be contradicted, and such returns may be proved to be false: *Crofts v. Dexter*, 8 Ala. 767; 42 Am. Dec. 666; *Lapham v. Campbell*, 61 Cal. 296; *Wilson v. Hawthorne*, 14 Colo. 530; 20 Am. St. Rep. 290; *Bridgeport Sav. Bank v. Eldridge*, 28 Conn. 556; 73 Am. Dec. 688; *Owens v. Ranstead*, 22 Ill. 161; *Newcomb v. Dewey*, 27 Iowa, 381; *Stone v. Skerry*, 31 Iowa, 582; *Bramlett v. McVey*, 91 Ky. 151; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *Bell v. Williams*, 1 Head, 229; *Ridgeway v. Bank of Tennessee*,

11 Humph. 525; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193. Whether a return of the service of process may be contradicted is a question upon which there is a great difference of judicial opinion. If the return consists of an affidavit made by a private person, it may doubtless be disproved: *Lapham v. Campbell*, 61 Cal. 296. It is usually, however, the return of some officer against whom the party injured may have redress in case it is incorrect by an action for a false return. If the plaintiff in the action is shown to have induced the false return, or even if he was cognizant of its falseness, though he in no way induced it, perhaps all the courts would agree that relief might be granted on the ground that the party had been guilty of actual fraud in taking the judgment when he knew the process had not been served, and that the court was deceived by the false return of service: *Hamblen v. Knight*, 60 Tex. 36. In those cases where the party against whom relief is sought has done nothing to procure the false return, and is in no way implicated with it, there is a strong tendency to treat his act as conclusive, even when assailed in a suit to be relieved from the judgment because the defendant did not know of the pendency of the action against him, and therefore did not make the necessary defense: *Krug v. Davis*, 85 Ind. 309; *Cully v. Shirk*, 131 Ind. 76; 31 Am. St. Rep. 414; *Thompson v. McCorkle*, 136 Ind. 484; 43 Am. St. Rep. 334; *Goddard v. Harbour*, 56 Kan. 744; post, p. 400; *Taylor v. Lewis*, 2 J. J. Marsh. 400; 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 356; *Johnson v. Jones*, 2 Neb. 133; *Walker v. Robins*, 14 How. 584; *Knox County v. Harshman*, 133 U. S. 152. In our judgment, however, the better rule is that an officer's return does not constitute an insuperable objection to granting relief from a judgment based thereon, though the plaintiff did not know of its falsity. It may be false without there being any fraudulent intent either on the part of the plaintiff or the officer making it. He may have been mistaken as to the identity of the party against whom he made his return, or such return may have been due to a mistake of some other character. It will be found that the remedy of the defendant by an action against the officer is in most cases inadequate, and we cannot conceive how the plaintiff by a false return acquires any equity superior, or even equal, to that of the defendant to be relieved against an unjust judgment, the rendition of which is due to no fault of his: *Dunklin v. Wilson*, 64 Ala. 162; *Ryan v. Boyd*, 33 Ark. 778; *State v. Hill*, 50 Ark. 458; *Bramlett v. McVey*, 91 Ky. 151; *Hauswirth v. Sullivan*, 6 Mont. 203; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523; *Raymond v. Conger*, 51 Tex. 536; *Hamblen v. Knight*, 60 Tex. 36. Where there is an official return of due service of process, the party seeking relief on the ground that it is false must not only assume the burden of proving such falsity, but must also produce very clear and satisfactory evidence of his contention. There are cases going so far as to say that his evidence must be corroborated: *Allen v. Hickey*, 53 Ill. App. 437. To thus hold must be to deprive the complainant of relief in many cases where he is justly entitled to it, for the negative averment that he was not served is of such a character that post-

tive evidence in its support can but rarely come from any person save the party himself. It is sufficient, we think, that the tribunal exercising equity jurisdiction is satisfied that the complainant's averment that process was not served on him is true, and it will not be so satisfied in doubtful cases, but will permit the return to stand as correct, unless from the evidence such return clearly appears to such court to be false: *Cairo etc. Ry. Co. v. Holbrook*, 92 Ill. 297; *Duncan v. Gerdine*, 59 Miss. 50; *Sharp v. Schmidt*, 62 Tex. 263; *Calloway v. Pearson*, 6 Manitoba L. Rep. 364.

In some instances, though the process was served in the manner indicated in the return or other proof of service, such service was constructive, and the plaintiff resorted to it for a fraudulent purpose or falsely caused it to be made in such a manner that the defendant would be the least liable to acquire knowledge of the pendency of the action against him, and his defense has been thereby prevented, as where the plaintiff falsely stated in his affidavit that he did not know of the place of residence of the defendant, or that the defendant was not within the state, and could not be served with process therein, when such residence was known, and the defendant could be personally served with process within the state. In such cases, the party injured through fraudulent practices of this character is entitled to be relieved in equity: *Dunlap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143; *McNeill v. Edie*, 24 Kan. 108; *Jones v. Commercial Bank*, 5 How. 43; 35 Am. Dec. 419; *Earle v. McVeigh*, 91 U. S. 503.

Whether, when the court in the original action did not have jurisdiction over the complainant, he may obtain relief in equity without establishing the existence of a defense is a question already considered in this note. Another question of some difficulty is, whether, conceding the judgment to have been improperly obtained because of the want of jurisdiction over a party or a subject matter, relief ought not to be denied because the party complaining had or has an adequate remedy at law. This question we shall reserve for future consideration.

Though the process was properly served, the court may not have jurisdiction over the subject matter of the action or proceeding, or the particular judge before whom it is brought and by whom it is decided may be incompetent for some reason to act as such, or the court, after acquiring jurisdiction, may by some means have lost the right to further proceed. In all such cases, equity will grant relief, unless there is an adequate remedy at law. In truth, relief seems to have been generally granted without any inquiry whether a remedy at law existed or not: *Holcomb v. Boynton*, 151 Ill. 294; *Iowa etc. Co. v. Boylan*, 86 Iowa, 90; *Missouri etc. Co. v. Reid*, 34 Kan. 410; *Smith v. Pearce*, 6 Baxt. 72; *Chambers v. Hodges*, 23 Tex. 104; *Cunningham v. Taylor*, 20 Tex. 126; *Smith v. Deweese*, 41 Tex. 594.

The Unauthorized Appearance of an Attorney where the party for whom he appeared had not been served with process apparently presents a case in which the court proceeded without jurisdiction over the party misrepresented by such attorney, and, whether this view is correct or not, seems to warrant the interposition of equity in fa-

vor of a party who in ignorance of such appearance had his cause submitted and decided when he had no reason to suspect the existence of any judicial proceeding whatever against him. At first, however, the courts were inclined to deny relief in this class of cases on the ground that the appearance of the attorney, whether authorized or not, gave them jurisdiction, and that the remedy of the party prejudiced by the appearance was an action at law against the attorney, especially if he were not shown to be insolvent: *Burrill's Practice*, p. 37, note a, citing 6 Johns. 24, 296; 5 Am. Dec. 237; 1 Binn. 214; 1 Pet. C. C. 155; 9 Wend. 499; 2 Hill, 64; *Bunton v. Lyford*, 37 N. H. 512; 75 Am. Dec. 144; *Smyth v. Balch*, 40 N. H. 363; *Everett v. Warner*, 58 N. H. 340; *American Ins. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 561; *Vilas v. Pittsburgh etc. Co.*, 123 N. Y. 440. Even were the doubtful proposition conceded that an unauthorized appearance by an attorney gave the court jurisdiction over the defendant, it must also be conceded that as long as he was in ignorance of such appearance, he could not be chargeable with any fault or laches for not making his defense, and relief might justly be granted to him on the ground of accident or surprise. However this may be, it is now almost universally admitted that a court of equity will interpose in his behalf, and, generally, without making any inquiry respecting the solvency or insolvency of the attorney: *Great etc. Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204; *Anderson v. Hawke*, 115 Ill. 33; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Newcomb v. Dewey*, 27 Iowa, 381; *Harshey v. Blackmarr*, 20 Iowa, 167; 89 Am. Dec. 520; *Gifford v. Thorn*, 9 N. J. Eq. 702, 722; *Allen v. Stone*, 10 Barb. 547; *Elsworth v. Campbell*, 31 Barb. 134; *Jones v. Williamson*, 5 Cold. 371; *Glass v. Smith*, 66 Tex. 548; *McEachern v. Brackett*, 8 Wash. 652; 40 Am. St. Rep. 922; *Mills v. Scott*, 43 Fed. Rep. 452. If the attorney was authorized to appear in the action, but did some act which he was not authorized to do by his client, but within the scope of his powers as an attorney, there is a clear case of jurisdiction on the part of the court over the person represented by the attorney, and the judgment cannot be therefore avoided on the ground of want of jurisdiction over his person. The general rule upon this subject is, that an attorney must be deemed to represent his client, and either to act by virtue of instructions from him or in the exercise of a discretion conferred by his employment, and therefore relief cannot be had in equity from a judgment entered through the act, consent, or neglect, of the attorney. There may, perhaps, be cases in which it is shown that an attorney has proved recreant to his client through the fraud of the adverse litigant, and other cases in which the attorney may have acted under the influence of some mistake, and in either event relief may be granted against an unconscionable judgment due to such fraud or mistake. Where, however, there is no fraud or collusion between the attorney and the adversary of his client, relief cannot be had from a judgment due to the act or neglect of the attorney, unless it might, under the same client in person, or due to his own laches or neglect: *Winchester v. Grosvenor*, 48 Ill. 517; *Shricker v. Field*, 9 Iowa, 366; *Gifford v.*

Thorn, 9 N. J. Eq. 702; Vaughn v. Hewitt, 17 S. C. 442; Jones v. Williamson, 5 Cold. 371; Chester v. Apperson, 4 Helsk. 639; Barhorst v. Armstrong, 42 Fed. Rep. 2; Bradish v. Gee, 1 Amb. 229; Wynn v. Wilson, Hemp. 698.

Negligence of the Complainant.—Where a cause ordinarily sufficient to justify the interference of equity against a judgment at law is shown, the court may be induced to forego any action by establishing: 1. That the complainant, his counsel, or other agent has been guilty of negligence in the assertion or protection of his legal rights, and that he but for such negligence would not have suffered the wrong against which he complains, or, at all events, might have been relieved from it in the original proceeding; or 2. Conceding that the judgment is contrary to equity and good conscience, yet the complainant need not resort to equity because he has an adequate remedy elsewhere. The subject of negligence as a bar in equity to relief against judgments has been so recently considered in these reports as to warrant our giving it no further attention here: Note to Payton v. McQuown, 53 Am. St. Rep. 444-453.

Remedy at Law.—As against a bill in equity to enjoin a judgment, the defenses may be made: 1. That the complainant had in the original proceeding a remedy of which he might have availed himself, and, by not doing so, he has been guilty of negligence or laches, and therefore must be denied relief in equity; or, 2. Conceding the judgment to be unjust and one which ought not to be enforced against him, he still has an adequate remedy against such enforcement without resorting to a court of equity. Either defense, if established, is generally fatal to the complainant. The first defense has been considered in the note last referred to, and therefore will not now be treated, except by giving a few illustrations tending to show its existence and the circumstances under which it is applicable. If, during the progress of a case, one of the parties finds himself, from accident, surprise, fraud, or any other cause, unable to present his defense or cause of action, and relief may be had by application to the trial court, and he fails to make such application, he cannot, on an adverse decision being rendered against him, procure relief from it in equity: Waldrom v. Waldrom, 76 Ala. 285; Jamison v. May, 13 Ark. 600; Wingfield v. McLure, 48 Ark. 510; Morris v. Morris, 76 Ga. 733; Hentrayer v. Sumbargo, 54 Iowa, 607; Flannehan v. Wright, 67 Miss. 217; Reagan v. Fitzgerald, 75 N. Y. 230; Syme v. Trice, 96 N. C. 243; Galveston etc. Ry. v. Ware, 74 Tex. 47; McIndoe v. Hazelton, 19 Wis. 567; 88 Am. Dec. 701. The statutes in force in the various states generally authorize motions for new trials, by virtue of which the losing litigant may seek relief on the ground that the judgment against him was due to errors of law committed by the court during the progress of the cause or to misconduct of the jury or to various other specified errors and irregularities, and may also urge other matters which he claims prevented him from having a fair trial on the merits, such as his inability to circumvent, have been had from a judgment consented to by the produce evidence at the trial and a discovery afterward of such evidence, and his present ability to produce it. Whenever the com-

plainant had a remedy by motion for a new trial, it was his duty to pursue it. Hence he cannot, by neglecting it, entitle himself to relief in equity: *Hurlbut v. Thomas*, 55 Conn. 181; 3 Am. St. Rep. 43; *Hulett v. Hamilton*, 60 Minn. 21; *Gould v. Loughran*, 19 Neb. 392; *Woodward v. Pike*, 43 Neb. 777; *Hamblin v. Knight*, 81 Tex. 351; 26 Am. St. Rep. 818. So though the cause reached the highest appellate court, and a decision was there made against one of the parties which for some reason ought not to be enforced, and which might have been avoided or vacated by a motion for a rehearing or to vacate the judgment of affirmance, that remedy must be pursued, and, if not pursued, equity will not interfere: *Roebbling v. Stevens etc. Co.*, 93 Ala. 39; *Russel v. Slaton*, 38 Ga. 105; *Phelan v. Johnson*, 80 Iowa, 727. So a suit in equity cannot be made a substitute for an appeal, certiorari, or other appellate proceeding, and an injunction will be denied when the complainant had or has an adequate remedy by appeal or certiorari, and no sufficient reason is shown for not resorting thereto: *Wingfield v. McLure*, 48 Ark. 510; *Galveston etc. Co. v. Ware*, 74 Tex. 47; *Kanawha etc. Co. v. Ryan*, 31 W. Va. 364; 13 Am. St. Rep. 865; *Crandall v. Bacon*, 20 Wis. 640; 91 Am. Dec. 451. If a decree or other decision against which relief is sought was entered in equity, and the ground for relief was such as might be urged by bill of review, then that remedy must be employed instead of an independent suit to enjoin the enforcement of the judgment: *Smithson v. Smithson*, 37 Neb. 535; 40 Am. St. Rep. 504. The failure of a justice of the peace or other officer to do some act essential to an appeal does not authorize an injunction against a judgment when an adequate remedy existed by mandamus to compel the performance of the desired act: *Boyd v. Weaver*, 134 Ind. 266.

Where the ground for relief is that the court in the original action did not have jurisdiction over the defendant because the process was not served on him, he might have moved to vacate such judgment, and thus been permitted to appear and defend. There is much doubt whether, while his right to so move remains, he may refuse to avail himself of it, and seek relief in equity. On the one hand, it is insisted that the remedy by motion is adequate and must be pursued: *Logan v. Hillegas*, 16 Cal. 201; *Bibend v. Kreutz*, 20 Cal. 109; *Sanchez v. Carriaga*, 31 Cal. 171; *Luco v. Brown*, 73 Cal. 3; 2 Am. St. Rep. 772; *Hart v. Lazaron*, 46 Ga. 396; *Morris v. Morris*, 76 Ga. 733; *Hollinger v. Reeme*, 138 Ind. 363; 46 Am. St. Rep. 402; *Mason v. Miles*, 63 N. C. 564; *Gallup v. Allen*, 103 N. C. 24; *Whitehurst v. Transportation Co.*, 109 N. C. 342; *Crocker v. Allen*, 34 S. C. 452; 27 Am. St. Rep. 831; and the other that the remedy by suit in equity is at least as well adapted to the trial of the issues necessarily involved and is equally available whether the complainant might have sought relief by motion or not: *Connell v. Stelson*, 33 Iowa, 147; *Hernandez v. James*, 23 La. Ann. 484; *Caruthers v. Hartsfield*, 3 Yerg. 366; 24 Am. Dec. 580. If a remedy exists by motion to correct a judgment, an injunction will not issue where such remedy has not been resorted to: *Gould v. Loughran*, 19 Neb. 392. Though a judgment was free from error,

fraud, or other ground for equitable interposition when entered, its further enforcement may have become inequitable owing to matters occurring after its rendition, as where payments have been made thereon or the judgment debtor has by some other means been released therefrom. In such cases, he may procure relief by motion to enter satisfaction in whole or in part, or for a perpetual stay of execution, and while there are many authorities sustaining the issuing of an injunction in favor of a debtor so situated on the ground that the remedy by suit in equity is more efficient (*Marsh v. Haywood*, 6 Humph. 210; *Cradford v. Thurmond*, 3 Leigh, 85), others affirm that when there is a remedy by motion in the original cause, it must be pursued: *Cline v. Lowe*, 3 Ind. 527; *Gorsuch v. Thomas*, 57 Md. 334; *Parker v. Jones*, 5 Jones Eq. 276; 75 Am. Dec. 441; *Morrison v. Speer*, 10 Gratt. 228; *Howell v. Thomason*, 34 W. Va. 794; *United States v. McLemore*, 4 How. 286. This question will receive further consideration, post, 256.

Any Fraud Practiced After the Rendition of a Judgment for the purpose of making it more onerous or otherwise changing its effect constitutes a proper ground for relief in equity, at least in those cases in which it does not appear that the remedy of the complainant is adequate at law. Therefore, if a judgment entry is fraudulently altered so as to include a person not served with process and not originally named in the judgment, equity has jurisdiction to vacate it: *Chester v. Miller*, 13 Cal. 558. The rule is equally applicable when the record or entry of the judgment is fraudulently changed by increasing the sum for which it was rendered, and an injunction may therefore issue to restrain the collection of the judgment so altered: *Babcock v. McCanant*, 53 Ill. 214.

If the judgment against which relief is sought in equity cannot harm the complainant, and if, whenever it is sought to be enforced against him by action, he has a complete remedy by presenting his defenses at law, and if execution is taken out upon it, he may be entitled to treat any person or officer acting thereunder as a trespasser, and either recover damages for property seized or maintain an action for the possession thereof, there is no reason for resorting to equity, and an injunction should be denied. There are, indeed, cases in which relief in equity has been granted though it was apparent from the record that the judgment assailed was absolutely void, and therefore could harm no one: *White County v. Gwin*, 136 Ind. 562; *United States v. Reisinger*, 43 Mo. App. 571; *Jones v. Pharis*, 59 Mo. App. 254. Where, however, the judgment is clearly void, we apprehend that a suit in equity cannot be maintained merely for the purpose of having it decreed to be so: *Hill v. Hill*, 28 Barb. 23; and generally, whenever its invalidity is apparent from an inspection of the record so that no extrinsic evidence is essential to defend against it, and he who relies upon it must necessarily fail upon the production of such record, and the remedies of the judgment debtor must therefore be adequate under all circumstances in which the judgment or other writ issued thereon is sought to be employed against him, equity need not and will not interfere: *Chipman v. Bowman*, 14 Cal. 157; *Sanchez v. Carriaga*, 31 Cal. 170; *David-*

son v. Floyd, 15 Fla. 667; Lumpkin v. Snook, 63 Iowa, 515; St. Louis etc. Co. v. Reynolds, 86 Mo. 146; Proctor v. Pebbitt, 25 Neb. 96; Haynes v. Aultman, 30 Neb. 416; Connery v. Swift, 9 Nev. 39.

The complainant may have made an appropriate motion for relief in the original action within due time, but the court may have refused to grant it, and thereby left him liable to the judgment of which he complains. This action of the court may, in some instances, be subject to review upon appeal. Whether it is so or not, the question must frequently arise whether the denial of the relief precludes a court of equity from interfering. Doubtless, where the remedy in the original action was by motion for a new trial, and such motion, being made, was denied, this denial is conclusive and final, unless reversed on appeal: Collins v. Butler, 14 Cal. 223; Davis v. Bass, 4 Ind. 313; Gray v. Barton, 62 Mich. 186; Matson v. Field, 10 Mo. 100. In all or nearly all other cases the decision of the motion is not deemed *res judicata*, and instead of precluding redress in equity, merely perfects the right to such redress, because it shows that the complainant has exhausted his remedies at law, and therefore must be relieved in equity or left remediless. "The rule under which a court of equity declines to interfere until after an application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant relief gives to a court of equity the same authority to interfere as if the other court was powerless to render aid": Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; Foote v. Despain, 87 Ill. 28; Truett v. Wainwright, 4 Gilm. 418; Simpson v. Hart, 14 Johns. 63; Blank v. Blank, 107 N. Y. 91; Wistar v. McManes, 54 Pa. St. 318; 93 Am. Dec. 700.

As to the Parties Who may Obtain Relief in equity from a judgment at law, it necessarily follows that there can be no rule of restriction other than that the complainant must be one against whom the judgment may operate inequitably and unconscionably, and who by or at its rendition was prejudicially affected thereby. If, at such rendition, he was not prejudicially affected, he has no cause of complaint. Conceding that the parties to the action, or one of them, had a sufficient ground upon which to invoke the aid of equity to prevent the enforcement of the judgment, still if he is satisfied with it, or, at least, makes no objection to it, outside persons will not be permitted to intermeddle with it at law or in equity: Markley v. Rand, 12 Cal. 275; Stewart v. Duncan, 40 Minn. 410; Mayes v. Woodall, 35 Tex. 687; Whitman v. Willis, 51 Tex. 429. As to persons having rights paramount to those of the parties to the action and not affected by the judgment at law, equity need not, and will not, interfere: Harper v. Hill, 35 Miss. 63; Russell v. Inter-State etc. Co., 112 Mo. 40. So, as a general rule, the right to complain of a fraud, or to file a bill in equity to set aside a transaction for fraud, is not assignable: Brush v. Sweet, 38 Mich. 577; Smith v. Harris, 43 Mo. 561; Bullard v. Raynor, 30 N. Y. 197; Crocker v. Bellangee, 6 Wis. 665; 70 Am. Dec. 489; Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co., 20 Wis. 183; 88 Am. Dec. 740; Houghton v. Morley, L. R. 2 Ch. 164; and therefore one who becomes, after a judgment, the grantee

or assignee of a party thereto may not maintain a suit in equity against its execution or to obtain other relief from it: *Marriner v. Smith*, 27 Cal. 649; *French v. Shotwell*, 5 Johns. Ch. 554; 6 Johns. Ch. 235; *Shufelt v. Shufelt*, 9 Paige, 137; 37 Am. Dec. 381. On the other hand, if the judgment at and by its rendition might affect the rights of a person not a party thereto, and the circumstances were such that it cannot be enforced without giving the plaintiff an inequitable advantage over such party, he may seek and find relief in equity, and may, in many instances, avoid its effect in collateral proceedings without resorting to an independent suit for relief: *Freeman on Judgments*, sec. 336. Especially is this true when the judgment was procured by collusion between the parties for the purpose of unjustly prejudicing the interests of a third person: *Schuster v. Rader*, 13 Colo. 330; *Busenbark v. Busenbark*, 33 Kan. 572; *Edson v. Cummings*, 52 Mich. 52; *Palmer v. Martindell*, 43 N. J. Eq. 90; *Gottlieb v. Thatcher*, 34 Fed. Rep. 435; or the judgment was suffered by the defendant because he was not the real party in interest, and therefore was indifferent to the result of the action: *Bergman v. Hutcheson*, 60 Miss. 872. Creditors of the person against whom judgment was entered are among those who may be relieved in equity against its operation (*Bank v. Burnett M. Co.*, 33 N. J. Eq. 486), provided they have reduced their demands to judgment (*Wintringam v. Wintringam*, 20 Johns. 296; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Bennett v. Musgrave*, 2 Ves. 51), and are, therefore, in a situation to assail the act or transfer of their debtor as being made or suffered for the purpose of hindering, delaying, or defrauding them. As an illustration of the rule that a third person is entitled to relief against a judgment in equity when its enforcement may prejudicially affect his interests, we refer to *Street v. Alden*, 62 Minn. 160, post, p. 632, in which a landowner was permitted to maintain a suit to set aside a judgment rendered on appeal from an order of a town board of supervisors vacating and discontinuing a highway, it appearing that the complainant as a landowner was injuriously affected by such judgment, and the judgment itself was due to the parties in interest being kept in ignorance of the proceedings in the cause, an appearance having been entered on behalf of the town by one of its officials, who produced no witnesses and offered no evidence in its behalf, and thereby procured the rendition of the judgment in question. The court said: "We have no doubt that the plaintiff had such interest in the subject matter of the supervisors' order as would enable him to maintain this action, and that the remedy sought is a proper one. The plaintiff, a signer of the petition and the owner of land upon which was the vacated and discontinued highway, was directly and materially affected by the verdict which reversed and set aside the supervisors' order. If the prayer of the petitioner had been refused, he could, as an aggrieved party, appeal to a jury. His rights did not end when, through fraud and deception, the order granting the prayer was reversed and annulled."

On the other hand, no party has any especial claim to the aid of equity based on his peculiar character, condition, or circumstances,

except in so far as such character, condition, or circumstances may show that it would be specially inequitable to enforce the judgment against him, or may tend to exonerate him from any charge of negligence or laches in the former action, or would otherwise show that he could not properly make his defense or present his cause of action therein. The complainant may be an infant, or, if not an infant at the time of the bringing of the suit to obtain relief from the judgment, may have been under disability at the time it was entered. It was formerly the practice in equity to insert a clause in decrees, giving to infant defendants a right by bill of review or by original bill of showing that the decree against them was improper, and ought not to be enforced: *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179; *Harris v. Youman*, 1 Hoff. Ch. 178; *Wright v. Miller*, 1 Sand. Ch. 103; *Richmond v. Tayleur*, 1 P. Wms. 734. At the present time, there is but little doubt that an infant is bound by a judgment or decree to the same extent as a person of full age, and at least in all cases where the judgment or decree against an infant is absolute and does not upon its face give him any right to dispute it at some future time, he is as much bound thereby as an adult: *Allman v. Taylor*, 101 Ill. 185; *Ralston v. Lahee*, 8 Iowa, 23; 74 Am. Dec. 291; *Daniell's Chancery Practice*, 205. This rule has been enforced against infants where they were attempting to obtain relief against a bona fide purchaser without notice, though the suit was one seeking to set aside the original decree on the ground that there was an error therein in not giving the infant a day to show cause, or error in some other respect: *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172; *Bennett v. Hamill*, 2 Schoales & L. 575; and even where the original judgment or decree was procured by the guardian or other representative of the infant for the purpose of defrauding him: *Gwinn v. Williams*, 30 Ind. 374; *Wright v. Miller*, 1 Sand. Ch. 103. An infant is, of course, entitled to relief from a judgment or decree upon the same grounds which would be available if he were an adult, as that the judgment against him was procured by the fraud or collusion of a guardian, administrator, or other person whose duty it was to protect the interests of such infant: *Griswold v. Hicks*, 132 Ill. 494; 22 Am. St. Rep. 549; or was based upon a warrant of attorney given by an infant for articles furnished to him in defiance of the request of his guardian: *L'Amoureux v. Crosby*, 2 Paige, 422; 22 Am. Dec. 655. But an infant is not, any more than an adult, entitled to be relieved from a judgment because of an irregularity in the proceedings, and hence a judgment against an infant will not be enjoined on the ground that the proceedings were irregular, because the court omitted to appoint a guardian ad litem to represent such infant: *Drake v. Henshaw*, 47 Iowa, 291. A like rule applies to judgments against insane persons. They are not entitled to relief from such judgments in equity because of their insanity, nor, indeed, upon any other ground not open to a person of sound mind: *Woods v. Brown*, 95 Ind. 164; 47 Am. Rep. 369; though, of course, there may be many cases in which the insanity of the complainant at the time of the entry of the judgment against him may be a material circumstance, as where it is shown that, because of such insanity, he

did not, and could not, make a proper defense, and the plaintiff in the action took advantage thereof for the purpose of procuring an unconscionable judgment. The complainant may be an administrator or other representative of a deceased person. He will not be relieved from a judgment merely because it was rendered against him in his representative capacity, but it is obvious that he may sometimes be entitled to relief where an adult person would not because of his want of complete knowledge of the facts of the case and of his consequent inability to present his cause of action or defense upon the merits, and the court will, therefore, be more inclined than in the case of an adult to entertain the complaint of an administrator or other representative of a decedent alleging that since the entry of the judgment he has for the first time discovered facts which, if known to him before the trial, he would have presented for the consideration of the court in the original action, and which show that the judgment entered therein was unjust: *Reeder v. Duncan*, 1 Bibb, 368; *Hewlett v. Hewlett*, 4 Edw. Ch. 7; *Gardiner v. Bowling*, 12 Gill & J. 381. So an executor or administrator who, in the belief that he had assets of the estate ample for the payment of all its debts, suffers judgment to be entered against him, will be relieved in equity, if those assets become insufficient through an unexpected depreciation in their value, for otherwise he would be held responsible without any fault of his part, the defense arising after the entry of the judgment, being one that he could not, by any degree of diligence, have made available in the original action: *Miller v. Rice*, 1 Rand. 438; *Pickett v. Stewart*, 1 Rand. 478. The fact that the judgment was against a trustee or other person who had no real interest in the controversy is often material in a suit by a cestui que trust or other beneficiary who is affected by such judgment, and such beneficiary will generally be accorded relief if he can show that his interests were prejudicially affected by the judgment, that the claim sued upon was not one which ought to be enforced against him or his estate, and that the interests of the trustee would be best subserved by suffering the judgment against which complaint is made: *Meyer v. Butt*, 44 Ga. 471.

The decisions respecting the validity of judgments against married women are very conflicting. In the majority of states such judgments are valid, but in the minority they are regarded as void even in a collateral proceeding, unless it appears that they were founded upon causes of action upon which married women were suable by the statutes of the state (*Freeman on Judgments*, sec. 150); and, when void for these reasons, can be enjoined: *Griffith v. Clarke*, 18 Md. 457; *Loweckamp v. Koechling*, 64 Md. 96; *Hoffman v. Shupp*, 80 Md. 61. In those states in which a judgment against a married woman is valid to the extent that it cannot be collaterally attacked and avoided, relief therefrom cannot be granted in equity, unless facts are established which would entitle the plaintiff to relief independent of the fact of coverture, with the exception arising when they are shown to have been obtained through the fraud of the husband in combination with another person. It is not enough

that a married woman prove facts sufficient to have avoided the judgment in the first instance. She must allege and establish that she was deprived of a full defense by the contrivance of her adversary. The mere inaction of her husband will not sustain the charge of connivance: *Green v. Branton*, 1 Dev. Eq. 500. Nor can she obtain relief merely because of her ignorance of her legal rights during the pendency of the former action on account of which she failed to make a proper defense therein: *Hartman v. Ogborn*, 54 Pa. St. 120; 93 Am. Dec. 679.

Though the judgment complained of may, when entered, be against or prejudicially affect the interest of two or more parties, it is not necessary that they join in a suit for relief therefrom. Either of them, when such judgment is about to be employed against him, may obtain an injunction to restrain it so far as it may affect him or his property rights, leaving it to be enforced against his codefendants and such other persons affected thereby as do not choose to seek relief therefrom: *Merriman v. Walton*, 105 Cal. 403; 45 Am. St. Rep. 50.

The Persons against Whom Relief in Equity may be Granted from a judgment at law are not restricted, except by the consideration that where the equities are equal, the legal title prevails. Hence if the relief sought includes persons who have acquired the title to property in reliance upon a judgment regular upon its face without any notice of any vice whatever in the proceedings and for a valuable consideration, equity will not interfere as against them: *Reeve v. Kennedy*, 43 Cal. 649; *Stokes v. Geddes*, 46 Cal. 17; *Maina v. Elliott*, 51 Cal. 8; *McNair v. Toler*, 21 Minn. 175; *Hamlin v. McCahill*, Clarke Ch. 249; *Fetterman v. Murphy*, 4 Watts, 424; 28 Am. Dec. 729; *Drexel v. Man*, 6 Watts & S. 386; 40 Am. Dec. 573. There are undoubtedly decisions of courts of the highest character which have overlooked this rule or denied its application, and which have decided that where a judgment was based upon an unauthorized appearance of an attorney, relief might be had against it, though the granting of such relief involved innocent purchasers for a valuable consideration, having no reason whatever to suspect any lack of authority on the part of the attorney upon whose appearance the judgment was founded: *Harshey v. Blackmarr*, 20 Iowa, 161, 183, 184; 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329; *Shelton v. Tiffin*, 6 How. 103. Actual notice of fraud, or other cause entitling the complainant to relief, need not be brought home to one who claims to be an innocent purchaser in good faith. It is sufficient that he had notice of the facts which ought to have excited suspicion and induced inquiry. Thus, if the original action was against a corporation, one who knew that its commencement and pendency had been concealed from the corporation defendant and its principal officers, cannot be protected as an innocent purchaser on the ground that he did not know that a defense to the action existed. From such concealment he was bound to conclude that a fraud was being committed against the corporation. "He is not entitled to protection as an innocent purchaser from the fact that he did not participate in the fraud. Having notice that a fraud was committed, he was bound

to inquire what the rights of the parties were": *Lang Syne Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337.

Relief for Causes Occurring Subsequent to the Rendition of the Judgment may be granted in equity, where it appears that the judgment, though at its rendition not infected with fraud or other vice, ought not to be enforced, and that the remedy of the party liable to be injured by its enforcement is not adequate at law. The causes occurring after the entry of judgment and rendering its further enforcement inequitable, and on account of which such enforcement may be enjoined, include those cases in which the defendant has a setoff or counterclaim of the benefit of which he must be deprived unless allowed to deduct it from the amount of the judgment. If such setoff existed prior to the commencement of the original action, and the practice prevailing in the state in which that action was pending was such that the setoff might have been pleaded therein, courts of equity in some of the states, will not interfere in a subsequent suit for the purpose of enforcing the right of setoff against the judgment, on the mere ground that the judgment creditor is insolvent: *Sayre v. Harpold*, 33 W. Va. 553. If, from any cause, a setoff or other matter of credit was of such a character that it could not have been recognized in the original action, and could not, therefore, have been enforced therein, it remains available in equity, notwithstanding the entry of the judgment in the original action: *French v. Garner*, 7 Port. 549. It is, of course, essential, before equity will interfere to enforce a right of setoff against a judgment, to show that there is no adequate remedy at law. Hence, if the judgment creditor against whom the right of setoff is claimed is solvent, and the setoff can, therefore, be enforced against him by ordinary legal proceedings, there is no ground for invoking the jurisdiction of equity: *Smith v. Ross*, 3 Humph. 220; *Boone v. Small*, 3 Oranch C. C. 628. Where, however, the judgment creditor is insolvent, and, if permitted to enforce the judgment, the judgment debtor will be left remediless and unable to enforce a setoff existing in his favor, equity will compel the allowance of such setoff, nor will relief be denied because the insolvency existed prior to the rendition of the judgment, and the setoff might have been pleaded in the original action, providing the rules of practice prevailing in the state leave it optional with the person having the setoff whether he shall plead it as a defense when sued or assert it in an independent action against his debtor: *Chicago etc. Co. v. Field*, 86 Ill. 270; *Galena etc. Co. v. Ennor*, 116 Ill. 55; *Mitchell v. Stewart*, 4 J. J. Marsh. 551; *Gridley v. Garrison*, 4 Paige, 647; *Williams v. Davies*, 2 Sim. 461.

Satisfied Judgments.—We have hereinbefore shown (ante, p. 250) that if a judgment has been satisfied, there is a difference of opinion among the judges as to whether an injunction may issue to prevent its further enforcement, some of the decisions maintaining that, unless in exceptional circumstances, an adequate remedy exists by motion in the original cause, to have a satisfaction of the judgment therein entered or a perpetual stay of execution granted. It must be admitted that in every case in which there is any issue respecting the fact of satisfaction, it can better be tried in a separate, inde-

pendent suit than by a mere motion, the evidence in which may generally be presented by affidavits, thus giving no opportunity for the cross-examination of the witnesses. From this consideration and others, the decided weight of authority is in favor of the proposition that an independent suit may be maintained, and final relief granted in the form of an injunction against further proceeding under the judgment: *Meyer v. Tully*, 46 Cal. 70; *Thompson v. Laughlin*, 91 Cal. 313; *Johnson v. Kitch*, 100 Ind. 30; *Woodburn v. Friend*, 19 La. 496; *Gurley v. Hiteshue*, 5 Gill, 217; *McClelland v. Crook*, 4 Md. Ch. 398; *Greenfield v. Hutton*, 1 Baxt. 216.

The plaintiff may refuse to accept satisfaction of his judgment. In this event, the defendant may also be entitled to an injunction: *Collier v. Sapp*, 49 Ga. 93; *Bowen v. Clark*, 46 Ind. 405; *Fisher v. Moore*, 19 Iowa, 84; *McClellan v. Marshall*, 19 Iowa, 561; 87 Am. Dec. 454. Sometimes, instead of receiving payment in money, the plaintiff has accepted property, or upon some other valuable consideration, has agreed to release his judgment. In these cases, there can be little or no doubt of the propriety of interference on the part of courts of equity when, after receiving the benefit of his agreement, he refuses to comply with its conditions: *Wray v. Chandler*, 64 Ind. 146; *Harrison Machine Works v. Templeton*, 82 Tex. 443.

If the judgment is for the possession of property or for the enforcement of a lien thereon, the defendant or his successor in interest is entitled to an injunction upon discharging the debt secured by the lien: *Brigham v. White*, 44 Iowa, 677; *Texas etc. Co. v. Worsham*, 5 Tex. Civ. App. 245; or, upon doing, with the consent of the plaintiff, acts making the enforcement of the judgment for possession inequitable: *Nibert v. Baghurst*, 47 N. J. Eq. 201. So, if at the time of the purchase of real property a judgment appears on the face of the record to have been satisfied by plaintiff's attorney, the further enforcement of the judgment will be enjoined, although such satisfaction was entered without authority, and the plaintiff has, by proceeding upon motion against the judgment debtor and upon notice to him only procured an order directing the vacation of such entry of satisfaction: *Wheeler v. Alderman*, 34 S. C. 533; 27 Am. St. Rep. 842.

Any Equitable Reason why a Judgment should not be Further Enforced, though it has not in fact been satisfied, is sufficient to justify a court of equity in enjoining its enforcement. Hence, if one of several tenants in common purchases a mortgage constituting a lien upon the common property, and, proceeding to foreclose it, is about to make a sale thereunder for the purpose of depriving his cotenants of their interest, they are entitled, upon tendering their proportion of the indebtedness, to an injunction preventing such sale: *Fisher v. Hartman*, 165 Pa. St. 16.

Sureties.—The defendant against whom a judgment has been entered may not be the principal debtor, his relation to the latter being that of indorser or surety. In the event of the actual satisfaction of the judgment, either by himself or his principal, he is doubtless entitled to the same remedies as the principal to prevent its further

enforcement. He may, however, be entitled to enjoin the judgment though his principal is not. There are many acts which, if done by, or with the consent of, a creditor will release a surety though the principal remains bound, such as entering into an enforceable agreement to extend the time for payment, or a surrender of securities or other means of enforcing payment which have come into the possession of the creditor. A few decisions may be found maintaining that by the recovery of a judgment against one who was before a surety he becomes a principal debtor, and therefore cannot afterward be released by those acts which have the effect of releasing sureties while the principal remains bound: *McDowell v. Bank*, 1 Harr. (Del.) 369; *McNutt v. Wilcox*, 1 Freem. Ch. 116; *Bay v. Tallmadge*, 5 Johns. Ch. 305; *Marshall v. Aiken*, 25 Vt. 328; *Dunham v. Downer*, 31 Vt. 249. The better opinion, however, is that a judgment does not, through the operation of the law of merger, change the relation of the parties so that a defendant who, before its rendition, was a surety becomes a principal. At least as against all persons chargeable with notice that he is a surety, any act which, had it occurred before the judgment, would have released him has the same effect when occurring after a judgment, and constitutes a sufficient defense to any action thereon: *Carpenter v. Devon*, 6 Ala. 718; *Brown v. Ayer*, 24 Ga. 288; *Crawford v. Gaulden*, 33 Ga. 173; *Trotter v. Strong*, 63 Ill. 272; *Chambers v. Cochran*, 18 Iowa, 159; *Allison v. Thomas*, 29 La. Ann. 732; *Carpenter v. King*, 9 Met. 511; 43 Am. Dec. 405; *Kallander v. Neidhold*, 98 Mich. 517; *Moss v. Pettingill*, 3 Minn. 217; *Rice v. Morton*, 19 Mo. 263; *West v. Brison*, 99 Mo. 684; *Storms v. Thorn*, 3 Barb. 314; *Bangs v. Strong*, 4 N. Y. 315; *La Farge v. Herter*, 11 Barb. 159; *Commonwealth v. Miller*, 8 Serg. & R. 452; *Commonwealth v. Haas*, 16 Serg. & R. 252; *Shelton v. Hurd*, 7 R. I. 403; 84 Am. Dec. 564; *Freeman on Judgments*, sec. 226; and also entitles him to an injunction against any further proceedings on the judgment against him or his property: *Lewis v. Armstrong*, 47 Ga. 289; *Sterne v. McKinney*, 79 Ind. 578; *Jones v. Bullock*, 3 Bibb. 467; *Smith v. Hays*, 1 Jones Eq. 321; *Dixon v. Ewing*, 3 Ohio. 281; 17 Am. Dec. 590; *Parker v. Nations*, 33 Tex. 210; *Jenkins v. McNeese*, 34 Tex. 189; *Baird v. Rice*, 1 Call, 18; 1 Am. Dec. 497. If the principal is released from the judgment by an act of the law in which the creditor does not join, as by a discharge in bankruptcy or insolvency proceedings, the surety remains liable: *Brandt on Suretyship*, sec. 150; but other acts occurring after a judgment and having the effect to discharge the principal debtor also discharge the surety, and entitle him to enjoin the further execution of the judgment, as where it is set aside or reversed as to the principal, though the surety did not join in the appeal or other proceeding for relief from the judgment: *Beall v. Cochran*, 18 Ga. 38; *Michener v. Springfield etc. Co.*, 142 Ind. 130; *Ames v. Maclay*, 14 Iowa, 281; *Dickason v. Bell*, 13 La. Ann. 249. But a surety is not exempt from the rule that equity will not grant relief while an adequate remedy remains at law, and if he has a remedy by petition or motion on the original action, must exhaust that remedy before resorting to an independent suit: *Michener v. Springfield etc. Co.*, 142 Ind. 130.

Laches.—As a general rule, courts of equity will not interfere on behalf of any person who has been guilty of a want of diligence in the protection or assertion of his rights, and relief may often be denied on the ground of laches, though the delay has not been sufficient to bring the plaintiff's cause of action within the bar of any statute of limitations. This is especially true where he or she does not come into equity with clean hands, and the circumstances indicate that the delay may have been due to unworthy motives. Hence, a party to a divorce who delays for more than a year before applying in equity for relief was held not entitled to favorable consideration, the circumstances indicating that the application would not have been made had she realized a sum promised to be paid her for submitting to the divorce, the court stating the general rule that, "after a decree has been rendered, and acquiesced in for a long period of time, reasons which would in the first instance have caused it to be withheld, may not be sufficient to warrant setting it aside": *Hubbard v. Hubbard*, 19 Colo. 13. So where a plaintiff was not, by the statute of a state, entitled to sue for a divorce therein until he had been more than a year a resident thereof, a wife who had submitted to a divorce upon consideration of a division of the property was held not to be entitled in equity to relief from the decree on the ground of the nonresidence of the plaintiff, her husband, and on the further ground that in the settlement accompanying the divorce he had defrauded her of the property, her application for relief not being made until three years after the granting of the divorce: *Ferry v. Ferry*, 9 Wash. 239.

Plaintiff must Do Equity.—Proceedings for relief against judgments are to the same extent as other suits in equity subject to the rule that he who seeks equity must do equity. If a judgment is merely in excess of the amount which is justly due the plaintiff, it will be enjoined as to such excess only: *Small v. Collins*, 5 Del. Ch. 234; *Barrow v. Robichaux*, 14 La. Ann. 207; *Hale v. Bozeman*, 60 Miss. 965; *Lang Syne etc. Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337; *Booth v. Kesler*, 6 Gratt. 350; *Heatherly v. Bank*, 31 W. Va. 70; *Kamm v. Stark*, 1 Saw. 547. In no case will a court of equity wrest from any party any legal advantage he may have gained without requiring his adversary to do complete justice, either by paying the amount due, or by submitting to any other order of the court which may be necessary to adjust the rights of the parties with each other according to fair dealing and good conscience: *Yonge v. Shepperd*, 44 Ala. 315; *Gregory v. Ford*, 14 Cal. 138; 73 Am. Dec. 639; *Hill v. Harris*, 42 Ga. 412; *Baragee v. Cronkite*, 33 Ind. 192; *Flickinger v. Hull*, 5 Gill, 60; *Overton v. Stevens*, 8 Mo. 622; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Creed v. Scruggs*, 1 Heisk. 590. But under ordinary circumstances it is not safe for the complainant to wait until equitable terms are imposed upon him by the court. He must in his complaint show his willingness to do equity by averring either that he has offered to pay such sum, or to do such act, as is just, or, at least, that he is ready to do so, and should offer to comply with any decree which the court may deem equitable under such circumstances.

Where he has not evidenced in his complaint, or bill in equity, his willingness to do equity, relief has frequently been denied him on that ground: *Tucker v. Holley*, 20 Ala. 426; *Williams v. Troy*, 39 Ala. 118; *Yonge v. Shepperd*, 44 Ala. 315; *Wilson etc. Co. v. Curry*, 126 Ind. 161; *Eaton v. Markley*, 126 Ind. 123; *Byers v. Odell*, 56 Iowa, 618; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Shelton v. Gill*, 10 Ohio, 417; *Smith v. Smith*, 75 Tex. 410.

Mode of Obtaining and Granting Relief.—In the case of a decree in equity the court may set it aside during the term in which it was entered: *Doss v. Tyack*, 14 How. 297. If, however, the term has expired, and it is sought to impeach the decree for fraud, collusion, and the like, the remedy is by an original bill in the nature of a bill of review, which may be filed without leave of the court: *Daniell's Chancery Practice*, 4th Am. ed., 974, 1584, 1585; citing *Ex parte Smith*, 34 Ala. 455; *Edmondson v. Moseby*, 4 J. J. Marsh. 501; *Evans v. Bacon*, 99 Mass. 213; *Pearson v. Nevitt*, 32 Miss. 180; *Terry v. Commercial Bank*, 92 U. S. 454; *Patch v. Gray*, L. R. 3 Ch. App. 203; *Davenport v. Stafford*, 8 Beav. 503; 9 Jur. 801; *Sheldon v. Fortescue*, 3 P. Wms. 111; *Lloyd v. Mansel*, 2 P. Wms. 73; or, if the party injured be an infant, he may proceed "either by a bill of review, or supplemental bill in the nature of a bill of review, or he may so proceed by original bill": *Daniell's Chancery Practice*, 4th Am. ed., 164, 173; citing *Richmond v. Tayleur*, 1 P. Wms. 737; *Carew v. Johnson*, 2 Schoales & L. 292; *Brook v. Mostyn*, 10 Jur., N. S., 554; 13 Week. Rep. 115; 13 Beav. 457; 2 De Gex, J. & S. 373, 417. If relief is based upon the ground of newly discovered evidence, it must be sought by bill of review: See note to *Brewer v. Bowman*, 20 Am. Dec. 160; *Connolly v. Connolly*, 9 Rep. 830. If it is a judgment at law against which relief is claimed, the remedy at chancery is by original bill in the nature of a bill of review: *Mussell v. Morgan*, 3 Brown Ch. 79; *Bennett v. Hamill*, 2 Schoales & L. 576; *Story's Equity Pleading*, sec. 426; though, according to some of the authorities, the bill is not considered an original bill unless it brings parties before chancery in addition to the parties to the judgment at law: *Denn v. Clark*, 8 Pet. 1. When relief is granted in chancery from a judgment at law, the interference is in all cases indirect. The judgment is not canceled nor vacated, nor is the court of law or its judge enjoined from proceeding, nor is a new trial granted in express terms. A court of equity acts exclusively upon the person of the adverse party by preventing him from making an inequitable use of his judgment: *Blight v. Tobin*, 7 T. B. Mon. 612; 18 Am. Dec. 219; *Farmers' Bank v. Collins*, 13 Bush, 138; *Justice v. Scott*, 4 Ired. Eq. 108; *Given's Appeal*, 121 Pa. St. 260; 6 Am. St. Rep. 795; *Wynne v. Newman*, 75 Va. 811. Sometimes he is restrained absolutely, and sometimes the injunction enjoins him from proceeding unless he first submits to a new trial: *Gainty v. Russell*, 40 Conn. 450; *Banks v. Shain*, Litt. See Cas. 51; *Yancey v. Downer*, 5 Litt. 8; 15 Am. Dec. 35, and note; *Hunt v. Boyler*, 1 J. J. Marsh. 484; 19 Am. Dec. 116; *Floyd v. Jane*, 6 Johns. Ch. 479. The mode and extent of the relief may be varied, according to the circumstances of the case, to make the remedy both efficient and equitable. While it is true that the authority now given by statuto

to courts of law to grant new trials has very nearly dispensed with the necessity of resorting to chancery for that purpose, still, instances occasionally occur in which no application for a new trial is made in the original action, or, if made, it was not disposed of on the merits, owing to the operation of some cause which is generally regarded as sufficient to invoke with success the aid and protection of courts of equity. In these instances chancery still has power to afford relief by requiring the successful party to submit to a new trial: *Mulford v. Cohn*, 18 Cal. 42; *Carrington v. Holabird*, 17 Conn. 530; 19 Conn. 84; *Carter v. Bennett*, 6 Fla. 214; *Howe v. Martell*, 28 Ill. 445; *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243; *Shepard v. McIntyre*, 5 Dana, 576; *Knifong v. Hendricks*, 2 Gratt. 212; 44 Am. Dec. 385.

The language employed in the decisions respecting the granting of new trials in equity, or the compelling of a party to submit to a new trial, is often misleading, in this, that it produces the impression that the verdict and judgment at law are vacated and set aside, and the case there taken up, and retried. Nothing of the kind occurs. A court of equity, when it grants relief, does not vacate or otherwise disturb the judgment at law, except in so far as it may enjoin a party from enforcing it. If it finds that with respect to some issue presented in the action at law the complainant ought not to be concluded by the judgment in that action, and that such issue ought to be tried anew, it will require the defendant to submit to the retrial thereof. But this retrial does not take place in the original action at law. The chancery court merely orders the issue "to be tried as other issues out of chancery are tried," and when so tried, the result is certified to it for its final action: *Knifong v. Hendricks*, 2 Gratt. 212; 44 Am. Dec. 385; *Wynne v. Newman*, 78 Va. 811.

To prevent conflicts between courts of equal authority, the rule prevails in some of the states that an action, the effect of which is to annul or to prevent the execution of a judgment, must be brought in the court in which it was entered: *Jones v. Ahrens*, 116 Ind. 490; *Dufossatt v. Berens*, 18 La. Ann. 339; *State v. Judge*, 44 La. Ann. 71; or in some court of powers superior to those of that court. In other words, "one court cannot control the execution of the orders and process of another court of equal jurisdiction": *Plunkett v. Block*, 117 Ind. 18; *Bender v. Damon*, 72 Tex. 92; *Cardinal v. Eau Claire*, 75 Wis. 404; *Coon v. Seymour*, 71 Wis. 340; *Fenske v. Kleunder*, 61 Wis. 602. But this rule is said to apply only when the judgment is valid, and not when relief from it is sought on the ground that it is void for want of service of process on the defendant: *Arnold v. Hawley*, 67 Iowa, 313; *Bender v. Damon*, 72 Tex. 92. As between the national and the state courts, neither will undertake to grant relief from a judgment of the other. One having equitable grounds for relief from a judgment rendered in the courts of either must apply to the courts of the sovereignty in which the judgment was entered: *Strozier v. Howes*, 30 Ga. 578; *English v. Miller*, 2 Rich. Eq. 320; *McKim v. Brooks*, 7 Cranch, 279; *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. Keokuk*, 6 Wall. 514; 1 U. S. Stats. at Large, 335. Note to *Plume etc. Co. v. Caldwell*, 29 Am. St. Rep. 310-318.

CITY ELECTRIC STREET RAILWAY CO. v. CONERY.

[61 ARKANSAS, 381.]

ELECTRICITY, EVIDENCE OF CAUSE OF ACCIDENT.

If there are a trolley wire and a telephone wire close to each other, the latter of which has sagged and finally fallen to the ground, and the only other wire in the neighborhood is an electric light wire, which is suspended above the telephone wire, and is not shown to have either sagged or come in contact with any other wire, and a child in the street is injured by coming in contact with the telephone wire where it has fallen to the ground, from these facts the jury are warranted in inferring that the latter wire had become charged with a strong current of electricity by coming in contact with the trolley wire.

ELECTRIC STREET RAILWAYS, DUTY OF TO AVOID INJURIES.—For any negligence respecting its trolley wire, charged with a powerful current of electricity, whereby that current escapes through any other conductor brought in contact with the trolley, a street railway corporation is answerable to a person injured in the public streets and guilty of no culpable neglect contributing to his injury.

ELECTRIC CORPORATIONS ARE BOUND TO USE SUCH REASONABLE CARE in the construction and maintenance of their lines and apparatus as a reasonable man would use under the circumstances, and when their wires carry a dangerous current of electricity, and the result of negligence may be the exposure of persons in the public streets to death or the most dangerous accidents, the highest degree of care is required.

NEGLIGENCE, CONCURRENT.—When an injury occurs through the concurrent negligence of two persons, and would not have happened in the absence of either, the negligence of both is the proximate cause of the accident, and both are answerable.

J. M. Rose and J. F. Loughborough, for the appellant.

H. F. Auten, for the appellee.

382 BATTLE, J. The City Electric Street Railway Company is a corporation, and operates a street railway in the city of Little Rock, in this state, by means of electricity. Its railway traverses an extensive territory, and extends through many streets. One of the appliances used in its operation is a trolley wire, suspended by means of poles and charged with strong currents of electricity. A part of the railway was constructed in Fourth street. Above it were suspended the trolley ³⁸³ wires. Intersecting Fourth street at right angles is Cross street, running north and south, while Fourth runs east and west. At the southwest corner of Fourth and Cross, O. E. White resided. Three blocks distant, on the corner of Markham and Cross streets, was a drugstore, which he owned and occupied. The residence and store were connected by a private telephone wire, which was suspended by passing it through loops of wire attached to insulators on poles, and was extended

over the trolley wire of the street railway at Fourth and Cross streets, its distance above it, at the lowest point, being between six and twelve feet. In the course of time the telephone wire began to sag, sagged two or three feet between the poles, and was finally broken near the corner of Markham and Cross by two electricians attempting to make it straight. The broken end was tied to a post, and in a few days became untied, or was again broken at or near the same place, and hung suspended in the street, the north end resting upon the ground. Two days afterward, Arthur Conery, a lad of about ten years—playing, perhaps, in the street in front of the home of his father and mother—stepped upon it, and was shocked, thrown down, and burned. His mother, hearing his cries, went to his rescue, and, attempting to relieve him, was likewise thrown down. A workman, laboring near by, next went to his assistance, and cut the wire and relieved him. After this he sued White and the railroad company for damages, recovered a judgment for three hundred dollars, and the company appealed.

The appellant denies that the evidence shows that the trolley communicated to the telephone wire the electricity with which it was charged when appellee was shocked and burned. It says that it was not proved "that there was any contact between the two wires." It is true that there was no positive evidence to that effect, but there was only one other electric wire in that ³⁸⁴ vicinity, and it was an "electric light wire," which was suspended above the telephone, and there is no evidence that it ever sagged or fell sufficiently low to come in contact with any wire below it. According to the evidence, there is only one reasonable theory upon which the condition of the telephone wire at the time appellee was injured by it can be accounted for, and that is that it came in contact with the trolley wire, while down, and received the electricity with which it was charged at the time. This fact is sufficient to sustain the verdict in that respect.

This fact being established the next question is, upon what duty of the appellant to the can this action be based? The answer to it is, upon the duty enjoined by the rule which requires everyone to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where the owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. So it is lawful for any person to gather water on his own premises for useful and ornamental purposes, but it is his duty to construct the reservoirs for

that purpose with sufficient strength to retain the water under all circumstances which can reasonably be anticipated, and afterward to preserve and guard them with due care. "For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible." It is the duty of railway companies to keep their tracks and rights of way free from inflammable matter, so as to prevent the communication of fire from their locomotives to adjoining property, and for a failure to discharge this duty they are liable for injuries occasioned by the neglect.

³⁸⁵ This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms, and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property. If they negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damage for the wrong done, if the party injured is guilty of no culpable negligence contributing to the injury: *Ugla v. West End Street Ry.*, 160 Mass. 351; 39 Am. St. Rep. 481; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786; *Western Union Tel. Co. v. Eyser*, 91 U. S. 495.

In *Texarkana etc. Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, it appeared that the defendant owned, maintained, and operated in the city of Texarkana a system of electric lights. During the night of the 22d of August, 1891, or early in the morning of the next day, its wires became disabled and out of repair, and, being either broken or disengaged from their fastenings, fell to the ground or sidewalks of the city, and lay there from 12:30 o'clock A. M. until after daylight in the morning, when the street on which they lay was thronged with people. The company ascertained that the wires were down about 2 o'clock A. M. of the same day, but not the exact locality. Ed. Walker, a boy, walking along the street about 6 o'clock in the morning of the day the wires had fallen, after some conversation with a bystander about the danger of the wires, picked up a dead wire. Being told to throw it down, he obeyed, but "flipped" it, as a witness said, into the air as he did so, and the wire struck a live wire before he let it go, and thereby transmitted through him an electric current which killed him instantly. The company was held responsible for damages on account of the injury.

³⁸⁶ The main difference between the case last cited and this is, the electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by

the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to anyone using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended: *Electric Ry. Co. v. Shelton*, 89 Tenn. 423; 24 Am. St. Rep. 614; *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371; 46 Am. St. Rep. 849.

Electric companies are bound to use "reasonable care in the construction and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard." This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death, or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the ³⁸⁷ danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents; for they are not responsible for accidents which a reasonable man in the exercise of the greatest prudence would not, under the circumstances, have guarded against: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786; *Uggle v. West End Street Ry. Co.*, 160 Mass. 351; 39 Am. St. Rep. 481.

In this case the cause of the accident was the falling of White's telephone wire and the contact of the same with the trolley wire of the appellant. The jury found both of them guilty of negligence—White, in permitting his wire to fall and remain down until appellee was hurt, and the appellant, in allowing the same to become charged with electricity by contact with its wire at the time of the injury. If this be true, the injury was the result of the concurring negligence of the two parties, and would not have

occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable: *Shearman and Redfield on Negligence*, 4th ed., sec. 31; *Thompson on Negligence*, 1088.

We have examined the evidence in this case, and the instructions of the trial court based on the same. Without setting out either, it is sufficient to say that, tested by what we have said in this opinion as to the law, we find no reversible error in the instructions, taken as a whole, and that the evidence is sufficient to sustain the verdict of the jury in this court.

Judgment affirmed.

ELECTRIC COMPANIES—DUTY AND CARE REQUIRED OF TO AVOID INJURY.—Electric corporations permitted to use the public streets for their own purposes, must be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles to the end that travelers along the highway may not be injured by their appliances: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note. A company using wires to convey electricity is required to use very great care to prevent injury to person or property: *Giraudi v. Electric Improvement Co.*, 107 Cal. 120; 48 Am. St. Rep. 114; *Western Union Tel. Co. v. State*, 82 Md. 293; 51 Am. St. Rep. 464.

JOINT LIABILITY FOR NEGLIGENCE.—When one has received an injury at the hands of two or more wrongdoers, all are jointly and severally liable to him for the full amount of damages occasioned by such injury: *Wisconsin Cent. R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49, and note. Where an accident occurs from two causes, each due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for a resulting injury, and the negligence of one is no excuse for the negligence of the other: *Gulf & Colorado etc. Ry. Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755. See, on this subject, the extended notes to *Village of Cartersville v. Cook*, 16 Am. St. Rep. 250; *New York etc. R. R. Co. v. Steinbrenner*, 54 Am. Rep. 135; *Borough v. Brisbane*, 57 Am. Rep. 488, and the note to *Consolidated Ice Machine Co. v. Keifer*, 23 Am. St. Rep. 695.

BRANCH v. POLK.

[61 ARKANSAS, 388.]

ENTIRETIES.—A CONVEYANCE OF REAL PROPERTY TO A HUSBAND AND WIFE VESTS TITLE in them as tenants by the entireties.

ENTIRETIES.—A MORTGAGE EXECUTED BY A HUSBAND, and purporting to convey the undivided one-half of a tract of land which he and his wife own as tenants by the entireties, must, upon his death, be utterly inoperative as against his widow.

ENTIRETIES, POWER OF WIFE TO CONVEY OR MORTGAGE HER INTEREST.—Under a law giving to married women the control of their separate property, with power to convey or dispose of it as if unmarried, a wife may convey and mortgage her in-

terest in an estate held by herself and her husband as tenants by the entireties, subject to his right of survivorship.

ENTIRETIES.—IF SEPARATE MORTGAGES ARE EXECUTED by a husband and wife, each purporting to convey the undivided one-half of a tract of land which is vested in them by the entireties, both being to secure the same indebtedness, and the husband subsequently dies, the mortgage by him becomes inoperative, because the whole property vests in her by survivorship; but the mortgage executed by her is enforceable as to the undivided one-half of the property.

Suit to foreclose two mortgages executed on the same day to secure promissory notes given by Lucius E. Polk to the complainant Mary P. Branch. The real property against which it was sought to enforce the mortgages was at their execution vested in Lucius E. Polk and Sallie M. Polk, husband and wife. Each mortgage purported to convey the undivided one-half of the property. After their execution, the husband died, and the wife, by right of survivorship, became the sole owner of all the property. Decree in favor of the defendants; the complainant appealed.

Rose, Hemingway & Rose and Tappan & Porter, for the appellant.

John J. & E. C. Horner, for the appellees.

391 RIDDICK, J. The lands upon which appellant claims a lien were held by Lucius E. Polk and his wife, Sallie M. Polk, under a joint conveyance executed to them by Clarence Quarles, commissioner. This joint conveyance to husband and wife vested in them an estate in entirety: *Robinson v. Eagle*, 29 Ark. 202; *Kline v. Ragland*, 47 Ark. 116; *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361.

After receiving this conveyance, each of the grantees gave to Mary P. Branch a mortgage on an undivided half interest in said land to secure notes executed **392** to her by Lucius E. Polk. These mortgages were executed at different places and at different times. The one by Lucius E. Polk was executed on the fourth day of April, 1892, and his wife executed one on the thirty-first day of May, 1892. Neither of them joined in the mortgage executed by the other. Now, the right of survivorship is a distinctive characteristic of an estate of entirety, and neither of the tenants holding by entireties can by a separate deed affect the right of survivorship existing in the other: *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269; *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371, and note; 3 Kerr on Real Property, sec. 1975.

In order to convey the entire estate in land held by entirety, the husband and wife must convey by a joint deed, or the deeds if separate, must each purport to convey the entire estate. Neither of the mortgages set up by the appellant purport to convey more than an undivided one-half interest in the land. It is contended by appellant that these two mortgages, being executed for the same purpose, must be taken and construed as one deed. If this be conceded as correct, it would not strengthen the position of appellant, for it would still be a deed conveying an undivided half interest only. When persons owning lands as tenants in common each convey an undivided half interest therein, they have conveyed the title to the whole, for neither of them held more than an undivided half interest, and the deed of each conveys his entire interest; but the entire estate is vested in each of the tenants by the entireties, for they hold, not by moieties, but by entireties, and a conveyance of an undivided half interest by one tenant does not purport to convey his whole interest. The deed of the husband can have no effect after his death. When that happened, Mrs. Polk became the sole owner, his interest passing to her by right of survivorship. If appellant has any ³⁹³ lien upon Mrs. Polk's land, it must be by force of her own deed, for she did not join in the deed of her husband, and is not affected by it.

As the mortgage executed by Mrs. Polk only purported to convey an undivided half interest in the land, we think it clear that in no event can appellant claim a lien beyond this undivided half interest.

But the most serious question for us to determine is, whether Mrs. Polk, during coverture, had the power by a separate deed to mortgage her interest in the lands held by herself and husband as tenants of the entirety. Whether a wife may, in this state, convey an interest held by her as such a tenant, as she may her interest in other real property, has not been determined by this court. The question decided in *Robinson v. Eagle*, 29 Ark. 202, was, that estates of entirety were not abolished by the constitution of 1868. This ruling was approved in *Kline v. Ragland*, 47 Ark. 116. In neither of those cases was any question concerning the power of the wife to convey her interest in such an estate by a separate deed considered by the court. At common law the husband had, during marriage, the exclusive control of such estate: *Fairchild v. Chastelleux*, 1 Pa. St. 176; 44 Am. Dec. 117; *Barber v. Harris*, 15 Wend. 615; *French v. Mehan*, 56 Pa. St. 287. But the authority of the husband to dispose of the rents and profits of land held in entirety did not arise from any pecu-

liarity of this estate or from any special powers conferred upon him as a tenant of the entirety, but arose out of the rule at common law, that during coverture, the husband had the control of the real estate of the wife: 2 Kent's Commentaries, 130; Hiles v. Fisher, 144 N. Y. 306; 43 Am. St. Rep. 766. Hence we find that, in many of the states where the wife has been clothed with the power to manage, control, and use her separate property, "the courts, following the logic of ³⁹⁴ the situation, have extended this right to estate by entireties, to the extent of denying the right of the husband or his creditors to deprive her of the use and enjoyment of her interest in such an estate during the life of her husband": 1 Ballard's Real Property, sec. 241; Hiles v. Fisher, 144 N. Y. 306; 43 Am. St. Rep. 766; Buttlar v. Rosenblath, 42 N. J. Eq. 651; 59 Am. Rep. 52; McCurdy v. Canning, 64 Pa. St. 41; Chandler v. Cheney, 37 Ind. 391; Shinn v. Shinn, 42 Kan. 1.

In this state a married woman has full control of her separate property, and may convey and dispose of it as if she were a feme sole. Our constitution and statute have excluded the marital rights of the husband therefrom during the life of the wife: Const. 1874, art. 9, sec. 7; Sandels and Hill's Digest, sec. 4945; Neelly v. Lancaster, 47 Ark. 175; 58 Am. Rep. 752; Roberts v. Wilcoxson, 36 Ark. 355. We think that the effect of these provisions was to give the wife control of all the property owned by her, including her interest in an estate by entirety as well as other real estate. To say that it did not apply to an estate by entirety would be to deprive her of a share in the rents and profits of such an estate during the life of her husband, and would establish an exception to the operation of the constitution and statute resting on no valid principle or reason: Hiles v. Fisher, 144 N. Y. 306; 43 Am. St. Rep. 766. On the other hand, to say that neither she nor her husband could convey any interest in such an estate except by a joint deed would tie up the estate, and prevent either of them from controlling or disposing of his or her interest without the consent of the other. It would also result in placing it beyond the reach of the creditors of either of them, and such is the rule followed in several of the states: McCurdy v. Canning, 64 Pa. St. 39; Chandler v. Cheney, 37 Ind. 391; Naylor v. Minoek, 96 Mich. 182; 35 Am. St. Rep. 595, and note.

³⁹⁵ But it would seem that this rule is to a certain extent illogical, for under it the effect of the statutes giving married women control of their own property is also in this instance to curtail the power of the husband over his own interest in real estate. The object of these laws was not to affect in any way the

control of the husband over his own property. Their sole purpose was to give to the wife what she did not have at common law, the right to control and convey her own property as if she were unmarried: *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361.

While such legislation has taken away the control of the husband over the interest of the wife in estates of entireties, as it has removed his control from her other property, yet it does not seem reasonable to hold that it also affected his right to control his own interest in such an estate, or that it exempted such interest from seizure by his creditors. As was said in *Buttlar v. Rosenblath*, 42 N. J. Eq. 651; 59 Am. Rep. 52: "Any device of this character for the protection of the husband's property from his creditors is unknown to the common law, and so contrary to public policy that it ought not to be ingrafted upon our system of laws, by interpretation of the statute, unless the intent to do so is clearly expressed."

The rational construction of these provisions of our constitution and statute, which "uprooted principles of the common law hoary with age," swept away the marital rights of the husband during the life of the wife, and gave enlarged powers to married women, is, not that they lessen the power of the husband over his own interest in an estate by entirety, but that they deprive him of the control over the interest of the wife which he formerly exercised *jure uxoris*, and confer upon the wife the control of her own interest. The right of the wife to control and convey her interest, we ³⁹⁶ think, is now equal to the right of the husband over his interest. They each are entitled to one-half of the rents and profits during coverture, with power to each to dispose of or to charge his or her interest, subject to the right of survivorship existing in the other: *Hiles v. Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762; *Buttlar v. Rosenblath*, 42 N. J. Eq. 651; 59 Am. Rep. 52.

This rule, as was said by Chief Justice Andrews, in the recent case of *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, "best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents, . . . and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's rights *jure uxoris* in his wife's property, and to enable the wife to have and enjoy whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate."

Our conclusion is, that Mrs. Polk having survived her husband, and become the sole owner of the land, her mortgage deed is valid and binding as to the undivided one-half interest in said land conveyed by her as security for the notes executed by her husband. The court erred, therefore, in not sustaining the demurrer to that extent. The decree is reversed, with an order that the demurrer be sustained to the answer so far as it undertakes to set up a defense to the mortgage executed by Mrs. Polk for said undivided half interest; otherwise, the decree is affirmed.

ENTIRETIES.—A tenancy by the entireties arises whenever an estate vests in two persons, they then being husband and wife: *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64, and note; *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430, and note. See, also, the note to *Enyeart v. Kepler*, 10 Am. St. Rep. 99, and the extended notes to *Hulett v. Inlow*, 26 Am. Rep. 65, and *Den v. Hardenbergh*, 18 Am. Dec. 377.

ENTIRETIES—CONVEYANCE OF.—The great characteristic which distinguishes a tenancy by entireties from a joint tenancy, is its inseverability, whereby neither the husband nor the wife without the consent of the other, can dispose of any part of the estate so as to affect the right of the survivorship of the other: *Hiles v. Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762, and note.

RECTOR v. McCARTHY.

[61 ARKANSAS, 420.]

NEGOTIABLE INSTRUMENTS.—A GUARANTY OF THE PAYMENT OF INTEREST on a promissory note is not a continuing guaranty, and applies only to the interest accruing before the maturity of the note.

Rose, Hemingway & Rose, for the appellant.

S. R. Cockrill and Ashley Cockrill, for the appellants.

⁴²² BUNN, C. J. Sam J. Churchill executed to appellant his two promissory notes, in the following form:

“[\$1083.33] Little Rock, Ark., Jan. 1, 1890.

“On or before the 1st day of January, 1892, for value received, I promise to pay H. M. Rector one thousand and eighty-three dollars and thirty-three cents, with interest at the rate of ten per cent per annum from date until paid; interest payable annually. As witness my hand, the date above written.

SAM J. CHURCHILL.”

Upon this note the appellees made the following guaranty:

“We guaranty the payment of the interest on the above note.
(Signed) “McCARTHY & JOYCE.”

"It is agreed that the two notes were given by Sam J. Churchill for a lot of stock and farming implements on what was known as the plaintiff's farm, in Pulaski county, Arkansas, which he had leased from the plaintiff for three years from date of notes, and that the said Sam J. Churchill also executed a mortgage on said stock and property to secure the said notes; that the said Sam J. Churchill abandoned the Rector farm, which he had leased, and failed to pay the first note due for said stock, and thereupon the plaintiff, H. M. Rector, through the trustee in the deed of trust securing said notes, took possession of the said stock and farm property, and sold it, and appropriated the proceeds in part payment of the mortgage debt. This sale was had in February, 1891, and by said sale one hundred seventy-three dollars seventy-eight cents was paid on the note in suit first maturing, such payment being credited as of February 17, 1891.

"It is further agreed that the guaranty of interest, as written upon said notes, was written by the defendants ⁴²³ in due course of their business as merchants, and for the purpose of enabling Sam J. Churchill to obtain the stock and farm implements for the purpose of farming, in order that he might have an opportunity thereby to pay certain prior indebtedness which he owed the guarantors.

"It is further agreed that no action has been taken by the plaintiff, H. M. Rector, to enforce the collection by law of the said notes against Sam J. Churchill since their maturity, and that the said Churchill has been entirely insolvent, and without visible property, since the maturity of said notes and since said mortgage sale."

Appellant sued the appellees for installments of interest accruing before and after the maturity of the notes, and on the trial before the court, sitting as a jury, asked the following declarations of law: "The guaranty in suit is a continuing guaranty, and running until the notes are paid." The court refused this, and declared that the guaranty ran only until the maturity of the notes, and gave judgment only for the interest accruing before maturity. The plaintiff saved proper exceptions to the ruling, filed a motion for a new trial, saving all points, and, this being overruled, excepted, filed his bill of exceptions, and appealed.

Thus it will appear that the only controversy in this case is, whether or not one who guarantees the payment of the interest on a promissory note is bound for the payment of the interest that may accrue after the maturity of the note. There are few cases in the books that bear directly upon this point, although there is no want of authorities that indirectly influence the dis-

cussion of it. And from these we gather that the courts have adopted certain rules by which the contracts of sureties and guarantors are to be construed; and some of these rules, briefly stated, are, that a surety or guarantor is, first of all, a favored suitor; that the ⁴²⁴ obligation of his contract will not be extended beyond its plain and obvious meaning; and when there is a doubt and uncertainty as to the meaning, growing out of an ambiguity of language that makes construction necessary, the doubt will be resolved in favor of the surety or guarantor, for the reason that he is not, and can never be, the full recipient of the consideration which has accrued or may accrue to the principal debtor, and, further, because his situation is comparatively a dependent one, since he does not enjoy the opportunity of protecting himself that belongs to the other parties to the contract.

We take it, therefore, that courts are to construe the contracts of these favored suitors, not exactly by the same rule as they would construe the contracts of the principal parties to the contract. Thus, while, as between these principals, the contract is to be construed so as to express the meaning and intention of both parties to it, in the case of the surety or guarantor that construction is to be given to his contract which will cause it to express his meaning and intention, and this intention to be such as the guaranteed party should have reasonably attributed to the guarantor in making the contract, judging from the circumstances surrounding and the object to be attained: 1 Brandt on Suretyship and Guaranty, secs. 122, 123, 156.

The principle announced is more readily understood by illustration than by mere general definition of the obligation. It would lengthen out this opinion too much, of course, to pursue the argument by that method. Cases wherein the contracts were held to be continuing are cited and commented upon in Brandt on Suretyship and Guaranty, from section 157 to 161, inclusive; and, when not continuing, from section 161 to 165. In section 166 of the same book, this general principle is announced: "When the words of the condition ⁴²⁵ of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital, and the surety will only be liable for the time therein specified." Thus it is said when an officer lawfully holds beyond the term for which he was elected or appointed, the surety on his official bond will not be bound for his acts or defaults after the expiration of the term for which

he was elected or appointed. Of course, the recitals of the bond itself might be made to cover the additional time.

In *Hamilton v. Van Rensselaer*, 43 N. Y. 244, where, Waddington and two others being indebted to the plaintiff's assignor in the sum of ten thousand dollars, it was agreed, in July, 1854, that he would be released from this joint obligation upon executing and delivering his bond for one-third of said amount, payable in January, 1861, with semi-annual interest, and defendant's guaranty of payment of the interest, which was done. The guaranty by defendant was as follows, indorsed on the bond given: "For value received, I guaranty the punctual payment of the interest on demand in default of its payment by Mr. Waddington."

The question was, whether defendant was bound for the interest beyond the date of the maturity of the bond. Held, that he was not. After adverting to the strict legal doctrine that it is only interest accruing before maturity of the obligation that is denominated interest in the true sense, and that that which accrues afterward is, strictly speaking, damages for breach of the contract of payment, and also to the contention of plaintiff "that, in construing the contract, it is not to be supposed that the parties had knowledge of or reference to these legal distinctions when the contract was made," ⁴²⁶ and that business men regard the sum recoverable after the principal is due, in their dealings with each other, as interest in the ordinary sense of the term, and not as compensation by way of damages," Chief Justice Church, in delivering the opinion of the court said: "Conceding the soundness of this position [of plaintiff's counsel], these recognized distinctions may be resorted to by the defendant to prevent a technical or arbitrary construction against him. The true rule of construction undoubtedly is, that the intent of the parties, to be gathered from the language and surrounding circumstances, is to prevail. The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guaranteeing the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that, by strict legal rules, interest, as such, cannot be recovered after default in the payment of the principal, and that such interest is not, therefore, within the language of the contract." The learned judge continues: "We do not place the decision upon this narrow ground, but prefer to rest it upon the position that, by the plain and ordinary meaning of language used in the contract, when ap-

plied to the facts existing at the time it was made, the interest recoverable after the principal became due, whether it is regarded as interest upon a continuing contract or as damages for its non-performance, was not in the contemplation of the parties at the time, and was not interest specified and provided for in defendant's contract. The construction contended for by plaintiff might render the contract as burdensome as if it had been a guaranty of the payment of the principal itself. The ⁴²⁷ defendant might never be able to discharge the obligation, except by the payment of the principal, and in that case the result would be to compel him substantially to perform a contract which, it is conceded, he never entered into." The same argument, we think, is applicable to the case now under consideration. We cannot conceive the idea that if, at the time of making the guaranty, the appellee had even had an intimation that his obligation would be sought to be extended in the end, he would ever have entered into it. It follows, therefore, that, if bound at all, it is not because he so intended when he entered into the contract, but because of a contingency which some technical rule required him to anticipate and provide against.

It seems to us that a guarantor of the payment of interest only—a mere incident of the debt—as in this case, is entitled to even greater consideration at the hands of the creditor than one who has guaranteed the whole debt; and the reason is not far to seek. Such a guarantor cannot (if the theory of plaintiff be correct) protect himself by the usual statutory provisions, and is at the mercy of both creditor and debtor—wholly subjected to the consequences of the neglect of the one and the failure of the other.

The principle announced in the case of *Hamilton v. Van Rensselaer*, 43 N. Y. 244, was reasserted in *Melick v. Knox*, 44 N. Y. 676, except in the latter case the theory that interest accruing after maturity is not in fact interest, but damages, which seems to have been in effect discarded as a vital principle in *Hamilton v. Van Rensselaer*, 43 N. Y. 244, is maintained. If that theory be true, of course it is an additional ground for the affirmance of the judgment in the case now under consideration. However, as we understand it, to break the force of this theory, appellant's counsel call our attention to the fact that, as a settlement of a controversy once pending ⁴²⁸ here, this court has in several cases declared it settled law with us that, where the conventional rate of interest merely is stipulated, and no words employed to indicate the coexistence of the rate of interest with the debt, the con-

ventional rate ceases at the maturity of the debt, and the legal rate then begins; but that, on the contrary, when words are employed indicating the intention of the parties to have been that the conventional should be the rate until the debt should be paid, the interest accruing after maturity is, in fact, interest, and not damages, because it is so declared by express contract. There is force in this argument, but we are inclined, after all, to the opinion, in view of the peculiar language of our constitution, and the object sought to be attained in the cases referred to, that the decisions of this court therein were intended to extend no further than to determine what should be the percentage before and after maturity in any given case; and that the court in none of these cases had in contemplation the distinction between the name and meaning of this percentage before and the same after maturity of the debt; and, consequently, the theory existing before the decisions as to this distinction remains the same with us, whatever that may have been. But this is only one of the grounds suggested by the courts as a basis for the rule contended for by appellee.

The case is not altogether free from doubt, but, from all the authorities directly in point we are able to present on the subject, and from reason equally as cogent for the position of the court below, if not more so, than for the opposite one, we are of opinion that there is no error in the judgment of the court below, and the same is therefore affirmed.

FOR EXAMPLES OF CONTINUING GUARANTIES, see the notes to the following cases: *Gard v. Stevens*, 86 Am. Dec. 53; *Me-nard v. Scudder*, 56 Am. Dec. 619; *Fellows v. Prentiss*, 45 Am. Dec. 493, and *Columbus Sewer-Pipe Co. v. Ganser*, 55 Am. Rep. 701.

POWERS v. ARKADELPHIA LUMBER COMPANY.

[61 ARKANSAS, 504.]

WITNESS, SERVICE OF PROCESS ON.—If a person is present in a county other than that of his residence, for the sole purpose of attending the taking of a deposition therein in a cause to which he is a party, and advantage is taken of his presence to serve process on him in another action, to compel him to defend it in a jurisdiction other than that of his residence, the service of such process should be quashed.

Blackwood & Williams, for the appellant.

C. V. Murry, for the appellee.

505 BUNN, C. J. A suit in chancery was pending in the Clark circuit court, wherein the appellant, Powers, **506** was plaintiff and the Arkadelphia College was defendant, for a balance of seven thousand or eight thousand dollars claimed by Powers to be still due him on his contract for erecting the college buildings. By agreement of counsel representing the respective parties, they met at Arkadelphia, and took depositions in the case on the seventeenth day of August, 1893. On the same day, the complaint in this cause was filed by counsel for plaintiff herein, who were also counsel for defendant in the chancery cause in which the depositions were being taken, as stated; and summons at once issued, and was served upon appellant, to be and appear in the Clark circuit court to defend herein.

At the following term of said circuit court, defendant, Powers, appeared for the sole purpose of moving the court to quash the summons served upon him as aforesaid, showing by affidavit that he was, at the time of the service of said summons, and continued to be, a resident of the city of Little Rock, in Pulaski county, as he had been for a long time previously, and that he was present in Arkadelphia on the seventeenth day of August, 1893, for the sole purpose of attending the taking of the depositions aforesaid, and that the same was necessary, and that advantage of attendance was taken to compel him to defend his said suit in another jurisdiction than that of his residence. He therefore prayed that the summons be quashed. His motion to that effect, however, was overruled, he saved exceptions, judgment was rendered against him, and he appealed.

There is really no controversy as to the facts—at least none that could affect the issue. We think the judgment ought to be reversed. After several sections immediately preceding, designating where civil actions are to be brought, according to the nature of the subject matter and the relative situation of the parties, section 5696 of Sandels and Hill's Digest, reads thus: "Every other action may be brought **507** in any county in which the defendant, or one of several defendants, resides, or is summoned." Similar statutes are found in all, or nearly all, the states. The appellee contends that the privilege of defendant should be restricted to the rule held by some of the courts, as in Illinois, for example—that is, to cases of arrest on civil process—and that the exemption does not extend to a nonresident suitor in ordinary cases, temporarily present in the state and county, or in the county, for the mere purpose of attending a suit to which he is a party, unless his presence has been procured by some arti-

vice, trick, or fraud of plaintiff or of his counsel": Citing *Greer v. Young*, 120 Ill. 184. We think, however, that the weight of authority is against that view of the subject: See *Works on Courts and their Jurisdiction*, 258-260.

One line of authorities rests the privilege solely on the familiar constitutional ground of freedom from arrest on civil process, but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the supreme court of Ohio in the case of *Andrews v. Lembeck*, 46 Ohio St. 40, 15 Am. St. Rep. 547, thus: "The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered": Citing many authorities. And, continuing, say that court: "The contention that the application of this principle should be or is confined to cases where the suitor is served with process while attending ⁵⁰⁸ upon judicial proceedings without his state is not supported by sufficient force of reason to justify the distinction." The statute of that state is similar to ours. In *Lamkin v. Starkey*, 7 Hun, 479, the supreme court of New York said: "The court has power, independently of the statute, to protect its suitors, officers, and witnesses." And the same substantially is said by the same court in *Matthews v. Tufts*, 87 N. Y. 568. And it further appears, from the great weight of authorities, that the privilege is not only assured while one is attending upon strictly judicial proceedings, but upon any tribunal whose business has reference to or is intended to affect judicial proceedings.

In *Larned v. Griffin*, 12 Fed. Rep. 590, the court said: "It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during attendance, and for a reasonable time in going and coming"; and, further, "that this protection extends to attendance of parties and witnesses before arbitrators, commissioners, and examiners." That was a case of arrest, it is true; but it is cited to show the nature of the tribunal, and attendance upon which will come under the rule.

In the case of *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153, the supreme court of New Jersey said that the vice-president of a

foreign corporation attending as a witness before a commissioner of that court, which testimony is to be used in a cause therein pending, is privileged from service of summons to appear in another action against said corporation.

The weight of authority is decidedly with the appellant, and the judgment is reversed, and the case is dismissed, without prejudice.

WITNESSES—PRIVILEGE FROM SERVICE OF PROCESS.—
A nonresident in attendance in court as a witness in a suit to which he is not a party is exempt from the service of process in another suit: *Capwell v. Sipe*, 17 R. I. 475; 33 Am. St. Rep. 890, and note; *Fisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780, and note; *Cameron v. Roberts*, 87 Wis. 291; 41 Am. St. Rep. 43, and note. See, also, the extended note to *In re Healey*, 38 Am. Rep. 717-722.

SPARKS *v.* DAY.

[61 ARKANSAS, 570.]

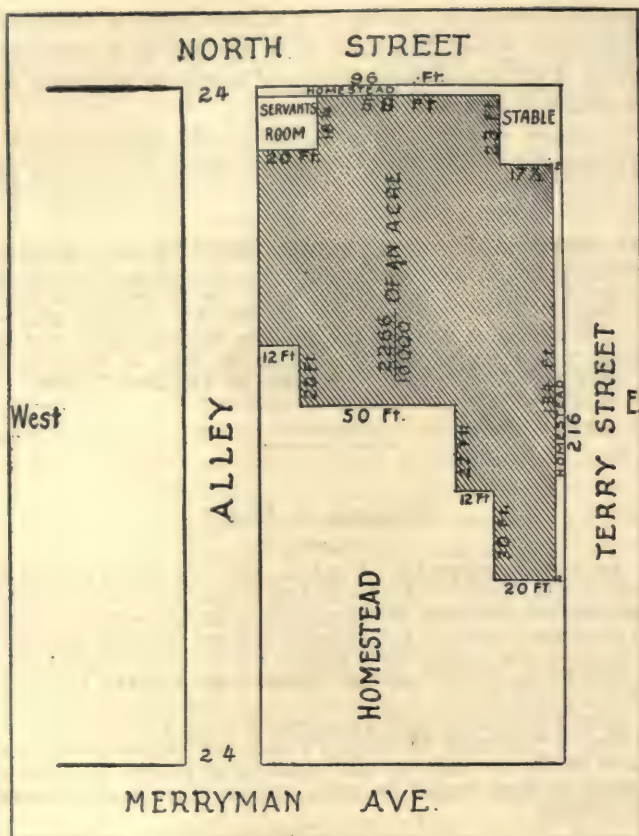
IF A HOMESTEAD IS LAID OFF IN AN ARBITRARY, CAPRICIOUS, AND UNREASONABLE SHAPE, for the purpose of injuring the creditors of the claimant, as where he so selects it as to surround the lands not selected and cut them off from access to the street and render them comparatively valueless, such selection may be set aside, and the claimant given leave to make another.

HOMESTEAD, FORM IN WHICH MAY BE DESIGNATED.
One who is permitted to select a homestead cannot be allowed to carve it out of the land in such form as to render the remainder worthless, or to so impair its value that creditors shall be unnecessarily injured.

N. W. Norton, for the appellant.

T. E. Hare, for the appellee.

⁵⁷¹ **WOOD, J.** The appellant, Sparks, filed a schedule before the clerk of the circuit court, claiming his homestead, and selecting it by metes and bounds. It is situated in the town of Wynne, and is of a value that required the area to be reduced to one-quarter of an acre. ⁵⁷² In selecting his quarter of an acre, he took, as a part of it, a walk two feet wide to his stable, and a walk two feet wide from the stable to the servants' house. The parcel left after he made his selection abutted on an alley, but nowhere on a street. The following plat shows the shape of the homestead selected, and the residue after the homestead was laid off:



The part claimed as a homestead and the residue all belonged to Sparks, and constituted the entire east half of block five in the town of Wynne. The description ⁵⁷³ of his homestead as contained in his schedule is as follows: "Commencing at the south-west corner of the east half of block 5, thence east 96 feet, thence north 216 feet, thence west 96 feet, thence south 20 feet, thence east 20 feet, thence north 18 feet and 6 inches, thence east 58 feet, thence south 23 feet, thence east 17 feet and 6 inches, thence south 134 feet, thence west 20 feet, thence north 30 feet, thence west 12 feet, thence north 27 feet, thence west 50 feet, thence south 134 feet to point of beginning, all in the town of Wynne, Arkansas." The homestead, as thus selected, almost surrounds the residue, cutting it off from access to any street, and leaving only an outlet of sixty-two feet on an alley on the west side thereof. It was in proof that this manner of the selection and the peculiar

shape in which it left the residue, making it inaccessible to the street, would make it of little value; that in this shape it would probably be worth one hundred and forty or fifty dollars, but that, if the homestead had been selected so as to give a street front to the remainder, it would be worth two or three times that amount, and would not reduce the value of the homestead. The appellant said that he would not have had much objection to laying off his homestead so as to give a street front of fifty-eight feet on the north to the parcel left, but preferred, if the law would allow him, to take it the way it had been designated.

The court below found that the homestead was "selected and laid off in an arbitrary, capricious, and unreasonable shape, to the injury of plaintiffs, and without any corresponding benefit to the defendant," and declared such selection of no effect and void, and thereupon set aside and quashed the supersedeas, and gave leave to defendant to file another schedule. The appellant seeks to reverse the judgment.

⁵⁷⁴ The supreme court of Alabama, in *Jaffrey v. McGough*, 88 Ala. 648, uses this language, which applies to this case, and exactly expresses our views: "An inspection of the remarkable diagram of the homestead attempted to be selected in this case—running, as its boundaries do, in a zigzag direction, and shifting toward every possible point of the compass; shapeless in its capricious irregularity, and without apparent design except to take unjust advantage—a most casual inspection of it, we repeat, is the surest demonstration, that such a thing cannot be tolerated by the law." Mr. Thompson, in his work on *Homesteads and Exemptions*, says there is a "growing disposition on the part of the courts, in determining what is to be included in the homestead, to take into consideration the legal subdivisions of land, such as public surveys and recorded town plats": *Thompson on Homesteads and Exemptions*, sec. 120. And Mr. Waples, we think, announces the just and correct doctrine, when he says "that, in the absence of any statute prescribing the form of the homestead, courts ought never to permit a selection manifestly made in disregard of the rights of others"; and he continues: "Creditors are interested in the parts of a tract which are not exempt; and it never was the intent of the legislature to cut them off from their remedy against nonexempt property, while protecting a limited quantity as a homestead. While the confinement of a homestead to the regular shape of . . . city lots is not a rule, because not everywhere practicable, it may be laid down as a rule that one authorized to select, declare, and record a homestead with a quantitative limita-

tion cannot be permitted to carve it out of his land in such form as to leave the remainder worthless, or to impair its value, so that creditors shall be injured." And we add, especially ⁵⁷⁵ would that be the case where it is shown, as here, that the meandering was of no benefit to the homestead claimant: *Waples on Homesteads and Exemptions*, 158, 160.

It follows that the judgment of the lower court is correct, and must be affirmed. So ordered.

HOMESTEADS—SELECTION.—In the selection of a homestead by a debtor from a large tract of land, discretion is necessarily allowed, but this discretion must be exercised within the bounds of reason and justice, and not in a manner entirely arbitrary and capricious, and a selection which makes a tract of very irregular and fantastic shape will not be allowed: *Jaffrey v. McGough*, 88 Ala. 648.

CITY ELECTRIC STREET RAILWAY COMPANY v. FIRST NATIONAL EXCHANGE BANK.

[62 ARKANSAS, 33.]

CORPORATIONS—AUTHORITY OF OFFICERS.—The president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper, unless such authority is expressly conferred. Such power is not to be presumed simply from the fact that it has been exercised.

CORPORATIONS—POWERS OF OFFICERS.—If the statute expressly confers the management of the affairs of a business corporation upon "not less than three directors," the president and secretary are not general agents. Their powers are delegated and special.

CUSTOM OR USAGE—JUDICIAL NOTICE.—A custom or usage to be good, and of which judicial notice is taken, must be general, and of such long standing as to have become a part of the law itself.

CORPORATIONS—POWER OF OFFICERS—LIABILITY OF CORPORATION.—A corporation is liable on negotiable paper issued by its president and secretary only when express power has been conferred upon them to issue it, or when they have habitually issued it, or when their act in issuing it has been ratified by the corporation, or when the latter has received a benefit from the transaction.

CORPORATIONS—ENTRIES ON BOOKS AS EVIDENCE. Entries upon the books of a corporation are prima facie evidence against it as admissions, and become conclusive when shown to have been duly and correctly made by its recording officer.

CORPORATIONS—ENTRIES ON BOOKS AS EVIDENCE. Corporations are not bound by false and simulated entries upon their records, unless, knowing them to be such, they have neglected to correct them, and some innocent third person, not knowing them to be false, has acted upon his faith in them to his prejudice.

J. McClure, for the appellant.

Ratcliffe & Fletcher, for the appellee.

36 WOOD, J. The bank sued the railway company on a negotiable promissory note purporting to have been executed by the company, payable to H. G. Allis and George R. Brown, and indorsed by them before maturity for value, and delivered to the First National Bank, and by it indorsed and delivered to the plaintiff.

The answer, in substance, sets up that the defendant was a corporation, organized under the laws of Arkansas (Sandels and Hill's Digest, c. 47); that the note was executed by the president and secretary of the defendant corporation, without any authority from or knowledge of its board of directors; that the charter and by-laws of the corporation gave no such authority; that the president and secretary had the records to show that they were duly authorized to issue the note, but that such record entry was false, and the directors had no knowledge of such entry until long after the maturity of the note; that the directors had never ratified the unauthorized acts of the said officers; that the said secretary and president had never indulged in a course of dealing between the corporation and third parties, so as to lead strangers to believe that they (the president and secretary) had power to issue negotiable paper in the name of the company, nor had the corporation ever received any consideration for said notes. A demurrer to this answer was sustained; and, the defendant refusing **37** to plead further, judgment was rendered against it for the amount of the note, which this appeal seeks to reverse.

The answer presented a good defense, unless it can be said: 1. That the authority of the president and secretary to issue the note in suit must be presumed from the fact that they have exercised it; or 2. That the corporation is bound by the false record showing that the directors had conferred such authority upon the president and secretary.

1. It may be stated as a general proposition that the president and secretary of a corporation are not empowered to bind it by their signature to commercial paper, unless the authority is expressly conferred by the charter, or given by the board of directors. They have no inherent power to execute negotiable notes in the name of the corporation: Tiedeman on Commercial Paper, sec. 121; Cook on Stock and Stockholders, sec. 716; McCullough v. Moss, 5 Denio, 567; 4 Thompson on Corporations, sec. 4619; Life etc. Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31; Hyde v. Larkin, 35 Mo. App. 365; Pierce on Railroads, 32-34; Walworth

County Bank v. Farmers' Loan etc. Co., 14 Wis. 325; 1 Morawetz on Corporations, sec. 537; Titus v. Cairo etc. R. R. Co., 37 N. J. L. 98-102; Wait v. Nashua Armory Assn., 66 N. H. 581; 49 Am. St. Rep. 630, and authorities there cited; National Bank v. Atkinson, 55 Fed. Rep. 465.

Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law: Mount Sterling etc. Co. v. Looney, 1 Met. (Ky.) 550; 71 Am. Dec. 491; Bacon v. Mississippi Ins. Co., 31 Miss. 116; 4 Thompson on Corporations, 4619; Craft v. South Boston R. R. Co., 150 Mass. 208; First Nat. Bank v. Hogan, 47 Mo. 472; Dabney v. Stevens, 40 How. Pr. 341; 1 Waterman on Corporations, 445; Hallowell etc. Bank v. Hamlin, 14 Mass. 180; Chicago ³⁸ etc. Ry. Co. v. James, 22 Wis. 194; Bliss v. Kaweah etc. Co., 65 Cal. 504.

We are aware that there are authorities contra, and counsel for appellee have cited us to American etc. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, where it is held that, "if the president and secretary sign a negotiable promissory note, their authority is inferred from their official relation." This case is analogous, the question being presented (as in the case at bar) on demurrer to an answer which negatived the authority of the president and secretary to issue such paper. But the court, to sustain its position in that case, cited only two cases, viz: Merchants' Bank v. State Bank, 10 Wall. 644, and Crowley v. Genesee Min. Co., 55 Cal. 273. In Merchants' Bank v. State Bank, 10 Wall. 644, the court use this language: "It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the defendant." True, it is also said "that if the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." But we submit that the broad dictum of the latter quotation was unnecessary for the determination of the question before the court, in view of the fact that there was shown a usage of other banks, and a usual course of dealing with the knowledge and acquiescence of the directors. It was this very language, doubtless, which caused the learned circuit judge in American etc. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, to hold, as a matter of law, that the authority

of the president and secretary would be presumed from the fact that they had exercised it.

³⁹ So, also, in the California case cited to support the ruling in *American etc. Nat. Bank v. Oregon Pottery Co.*, 55 Fed. Rep. 265, it was admitted that the president, whose authority was being questioned, "was the superintendent and general managing agent, having full control of the business of the corporation." The difference, therefore, between those cases and the one at bar, and the one in which they were cited, is too obvious for further notice. The language above quoted from Judge Swayne in 10 Wallace was first used by him in *Gelpcke v. Dubuque*, 1 Wall. 175, and it has been repeated in *Supervisors v. Schenck*, 5 Wall. 772, *Lexington v. Butler*, 14 Wall. 296, *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47-53, and *National Bank v. Young*, 41 N. J. Eq. 531. The facts of these cases did not justify such a sweeping declaration of law, for an examination will show that, in some of the cases, municipal or county bonds were in controversy, which showed upon their face authority for their issue; and in others that the contracts or transactions made or performed by the agent of the corporation were such as had been frequently or usually made or performed by him before, in the course of the business of the corporation; or that the corporation had received some benefit from the unauthorized act. But the doctrine announced in *American etc. Nat. Bank v. Oregon Pottery Co.*, 55 Fed. Rep. 265, is unsound, and not supported by the weight of authority. Besides, the principle it seeks to establish is in conflict with the doctrine announced by the supreme court of the United States in *Western Nat. Bank v. Armstrong*, 152 U. S. 346, where it was held "that the vice-president of a bank, however general his powers, could not exercise such a power, unless specially authorized so to do, and that persons dealing with the bank were presumed to know the general powers of the officers."

Mr. Morawetz, in speaking of these dicta in those cases where they have been incautiously used, said: ⁴⁰ "They must be considered in view of the facts of the particular cases in which they were made. Taken alone, as statements of a principle or rule of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle": 2 Morawetz on Private Corporations, sec. 608.

The rule that "if the president and secretary sign, their authority is inferred from their official relation," provided they might have had power under any circumstances to issue such paper for the corporation, is begging the question, where the au-

thority itself is challenged. This rule, too, ignores a fundamental principle of the law of agency, whether applied to natural persons or corporations; for corporations can only act through agents. It is said by Mr. Mechem in his work on Agency, section 289, that "every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere assumption of authority by the agent." Judge Miller of the supreme court of the United States, in *The Floyd Acceptances*, 7 Wall. 666, said: "The person dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for, said he, "it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was issued." This language is exceedingly apposite to the case at bar. It must be remembered that the answer in this case denies in toto the authority of the president and secretary to issue negotiable paper. Hence, this case bears no analogy to that line of cases where the authority exists for some purposes, but is exercised for different purposes than that for which it was conferred. ⁴¹ Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued.

Our statute for the incorporation of business corporations expressly confers the management of their business affairs upon "not less than three directors": Sandels and Hill's Digest, secs. 1330-1335. Another section makes it a felony for the president or secretary of a corporation to "willfully and designedly sign, with intent to issue, a promissory note without authority from the charter or by-laws of such corporation": Sandels and Hill's Digest, sec. 1604. Surely the legislature would not have made it a felony for these officers to issue negotiable notes, if they had such power *virtute officii*. From the above provisions, it appears that the president and secretary of corporations are not general agents. Whatever power they may have to act for the corporation at all in business matters must be delegated and special. We note, en passant, that the statute defines the duty of the secretary to be that of "keeping the books of the corporation": Sandels and Hill's Digest, sec. 1332. See Taylor on Corporations, sec. 236; 1 Beach on Private Corporations, sec. 202, and authorities cited in note; *Life etc. Ins. Co. v. Mechanics' etc. Ins. Co.*, 7 Wend. 31.

Those cases which hold that the president and secretary, or any other officer of a corporation, will be presumed to have authority where they have exercised it, provided, under any circumstances, it might have been conferred upon them, proceed upon the theory of a usage or custom from which authority will be implied. But such a theory cannot be maintained as to electric street railways in this state, for the reason that no such usage as to them exists. A usage, to be good, and of which the courts will take judicial notice, must be general, and of such long standing as to have become a part ⁴² of the law itself: *Mussey v. Eagle Bank*, 9 Met. 313; *Merchants' Bank v. State Bank*, 10 Wall. 604 (dissenting opinion).

The incorporation of electric street railways in the state of Arkansas is of comparatively recent date, and such corporations do not yet exist to any general extent throughout the state. Moreover, it can scarcely be conceived how a usage of the kind mentioned could have sprung up, in view of our statutory provisions, and especially that one making it a felony for the president or secretary of a corporation to willfully and designedly issue promissory notes without authority from the charter or by-laws: *Sandels and Hill's Digest*, sec. 1604. Manifestly, if the broad dictum of Mr. Justice Swayne in *Merchant's Bank v. State Bank*, 10 Wall. 604, is the law, then that numerous class of individuals who have invested their means in corporate property would have no protection whatever from the dishonest acts of their agents, whom they have intrusted with office. But the rule, as we have declared it, while protecting the shareholders, is just to the innocent holder; for in each case it may be shown by any competent evidence that the corporation is liable: 1. Where the board of directors or the by-laws have conferred upon the president and secretary the authority to issue negotiable paper; 2. Where the corporation, through its directors, has permitted these officers to habitually do such an act in the course of its business—in other words, has clothed them with the apparent authority to so act; 3. Where the directors have ratified the unauthorized acts of its officers; 4. Where the corporation has received the proceeds or any benefit from the transaction. But all of these things were negatived in the answer. Hence it was sufficient to call for the proofs.

2. The entries upon the books of the corporation are *prima facie* evidence against it, as admissions. The records and books of a corporation become conclusive ⁴³ evidence against it when they are the books and records of the corporation, and the entries

upon them have been duly made by the recording officer. But corporations are not bound by false and simulated entries upon their records in any case, unless, knowing that they are such, they have neglected to correct them, and some innocent third party, having had proper access to them or knowledge of them, has been misled thereby to his prejudice. But a corporation is not bound to a third party by a false entry upon its records, unless such party, not knowing the entry was false, has acted upon the faith that the entry was the true record of the proceedings. This is the holding of the supreme court of Massachusetts in *Holden v. Hoyt*, 134 Mass. 181, and authorities there cited.

Reversed, with directions to overrule the demurrer.

CORPORATIONS—POWER OF PRESIDENT.—The president of a business corporation may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incidental to his office, and may bind the corporation by contracts in matters arising in the usual course of business: *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; 24 Am. St. Rep. 351, and note; *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; 50 Am. St. Rep. 330, and note. To the same effect, see *Ford v. Hill*, 92 Wis. 188; 53 Am. St. Rep. 902, and note. The president of a corporation, being its chief officer, is presumably authorized to carry out its lawful contracts: *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312, and note.

CORPORATIONS—PRESIDENT AS AGENT.—The president of a corporation has no authority as such to act as its agent: *Walt v. Nashua Armory Assn.*, 66 N. H. 581; 49 Am. St. Rep. 630, and note.

EVIDENCE—CUSTOM—JUDICIAL NOTICE OF.—Judicial notice will be taken by the courts of a usage which has become general, but if a usage is special, that is limited to a particular locality or business or class of people, this rule is often inapplicable and evidence may be received to show the existence of the alleged usage: *Power v. Bowdle*, 3 N. Dak. 107; 44 Am. St. Rep. 511. See, also, the extended note to *Lanfear v. Mestier*, 89 Am. Dec. 664.

ROE v. KISER.

[62 ARKANSAS, 92.]

USURY—WHAT CONSTITUTES.—A note bearing legal interest is rendered usurious by a contemporaneous verbal agreement to pay twice the legal rate of interest on the money thus loaned.

USURY.—PAROL EVIDENCE IS ADMISSIBLE to prove that a note bearing legal interest was accompanied by a verbal agreement to pay twice that amount of interest and to thus establish the fact that the note is usurious and void.

EVIDENCE, TO VARY WRITING.—The illegality of a written instrument may be shown by parol evidence.

USURY—RIGHTS OF SURETY.—A surety on a usurious note, who voluntarily pays it, knowing its character, without re-

AMERICAN EMPLOYERS' LIABILITY INSURANCE COMPANY v. FORDYCE.

[62 ARKANSAS, 562.]

INSURANCE AGAINST LIABILITY.—A policy of insurance, by which the insurer expressly binds himself to pay all damages with which the insured may be legally charged or required to pay, or for which he may become legally liable, is not only a contract of indemnity, but also a contract to pay liabilities, and a recovery may be had thereon as soon as the liability attaches to the insured and before it is discharged. The measure of damages is the amount of the accrued liability.

CONTRACTS TO PAY LEGAL LIABILITIES differ from contracts of indemnity in this, that upon the latter action cannot be maintained and recovery had until the liability is discharged, while upon the former the action is complete when the liability attaches.

INSURANCE—GENERAL AGENT—WAIVER OF PREMIUM.—A general insurance agent, with authority to make terms for insurance, countersign and deliver policies, and collect premiums, has power to waive a condition in a policy requiring payment of the premium in money.

INSURANCE AGAINST LIABILITIES—CANCELLATION OF POLICY—EFFECT ON ACCRUED LIABILITY.—Although a policy of insurance against liabilities issued and in force reserves the right of cancellation for nonpayment of premium, the exercise of such right does not prevent the insured from recovering any liability accruing under the policy between the time of its issuance and cancellation, less the premium earned up to the latter time.

Action to recover on liability insurance. The insurance company mentioned above issued its policy to the City Electric Street Railway Company, which contained a clause that "said company will pay to the insured, or their legal representatives, all damages which the insured may be legally charged, or which the insured may be required to pay, for or by reason of any liability on account of injuries inflicted upon the person or property of any person or persons whomsoever, while traveling on the railroad of the insured, or for which the insured may be legally liable." This policy was issued December 9, 1892, to be in force for one year thereafter. Mrs. Meredith, a passenger on said railway, was injured by it on December 27, 1892, and recovered judgment against it in the sum of twelve hundred and fifty dollars. Fordyce, as receiver of said railway company, brought suit and recovered judgment against the insurance company for the amount of said judgment against the railway company. The insurance company appealed. Other facts appear from the opinion.

Blackwood & Williams, for the appellant.

Rose, Hemingway & Rose, and C. S. Collins, for the appellee.

568 WOOD, J. The findings of fact are comprehensive and accurate. We do not discuss the evidence upon which these find-

ings are based, for the reason that objection is urged here, not to the findings of fact, but to the legal conclusions drawn from them.

1. Appellants asked the court to declare the law to be "that the insurance contract sued on herein is a contract of indemnity, and that no liability is incurred thereon until the insured suffers a loss, and that the loss, in this case, would be an actual payment of the judgment rendered in favor of Callie Meredith." The contract speaks for itself. It is couched in unequivocal language. The insurer binds himself to pay "all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable." This is plainly a contract to pay liabilities. But if it could be said that the meaning were left in doubt on account of any ambiguity in the language of the contract, the proof leaves no doubt that it was the intention to require the insurance company to pay to the ⁵⁶⁹ street railway company the damages for which it (railway company) should become liable. The insured insisted upon a contract to pay liabilities, and the insurer consented to make it that way, embracing this special feature by way of interlineation in writing upon a printed form of contract. After it was so written, the general agents, in a letter to the insured, in which they inclosed the contract, mentioned this special feature, saying: "We think, with this amendment to the policy, you have the best insurance issued." This is not simply a contract of indemnity. It is more. It is also a contract to pay liabilities. The difference between a contract of indemnity and one to pay legal liabilities is, that upon the former an action cannot be brought and a recovery had, until the liability is discharged; whereas, upon the latter, the cause of action is complete when the liability attaches: *Locke v. Homer*, 131 Mass. 93; 41 Am. Rep. 199; and authorities cited; *Jones v. Childs*, 8 Nev. 121; *Carson etc. Assn. v. Miller*, 16 Nev. 327-332; *Smith v. Chicago etc. Ry. Co.*, 18 Wis. 17; *Thompson v. Taylor*, 30 Wis. 68; *Rector etc. of Trinity Church v. Higgins*, 48 N. Y. 532; and numerous other cases cited in appellees' brief. Also *Maloney v. Nelson*, 144 N. Y. 182; *Solary v. Webster*, 35 Fla. 363; *Gilbert v. Wiman*, 1 N. Y. 550; 49 Am. Dec. 359; cited in brief of appellants.

The measure of damages is the amount of the accrued liability: *Wicker v. Hoppock*, 6 Wall. 94; *Churchill v. Hunt*, 3 Denio, 321; *Pierce v. Plumb*, 74 Ill. 326.

Mrs. Meredith had recovered a judgment against the City Electric Street Railway Company from which the company had not appealed. This judgment was a legal liability against the

street railway company, for which, under its contract with the insurance company, the railway company was entitled to recover.

⁵⁷⁰ 2. Appellants insist that Parker & Co. had no authority to deliver the policy without collecting the premium. This is not the law. "A general agent of an insurance company, whose business it is to solicit applications for insurance, and receive first premiums, has the right to waive the condition requiring payment in money, and to accept the promissory note of the applicant, or of a third party in lieu thereof, or to undertake to make the payment to the company himself; and, when the cash payment is actually waived in either of these modes, the contract binds the company, notwithstanding the recital in the policy that it is not binding until the first premium is paid in cash." This excerpt, quoted by counsel for appellees from *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush, 430, is according to the consensus of modern authority; *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; 24 Am. Rep. 344; *Miller v. Life Ins. Co.*, 12 Wall. 285; *Boehen v. Williamsburg etc. Ins. Co.*, 35 N. Y. 131; 90 Am. Dec. 787; *Insurance Co. v. Colt*, 20 Wall. 560; *Goit v. National etc. Ins. Co.*, 25 Barb. 189; *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 213; *Wood v. Poughkeepsie etc. Ins. Co.*, 32 N. Y. 619; *Bragdon v. Insurance Co.*, 42 Me. 262; *Trustees etc. v. Brooklyn Fire Ins. Co.*, 18 Barb. 69; *May on Insurance*, sec. 134, and other cases cited by counsel for appellees.

The policy under consideration contained no provision requiring payment of the premium in cash as a condition precedent to the delivery of the policy and its taking effect. The court, however, evidently treated the matter as though such a condition existed, but found that it had been waived. The proof showed that Parker & Co. were general state agents, and had authority to make terms for insurance, to countersign and deliver policies, and collect premiums; and that they sometimes collected when the policy was delivered, sometimes at the end of the month, and sometimes took notes. They carried a general account with the company, and, on the ⁵⁷¹ 10th of each month, sent to it what was due upon a general balance. The policy having been delivered unconditionally, without a payment of the premium in cash, the court's finding that such payment had been waived, in view of this proof, and the law as announced *supra*, was clearly correct. The delivery of the policy without condition, and without exacting payment of the premium in cash, raised the presumption that a short credit was intended: *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347, and numerous cases there cited;

Miller v. Life Ins. Co., 12 Wall. 303; Little v. Insurance Co., 38 Ohio St. 110.

3. The issuance and delivery of the policy to the assured for a valuable consideration agreed upon and expressed therein, and the acceptance of the policy by the assured, put said policy in force: See authorities already cited. By the express terms of the policy, the insurance company was liable to the street railway company for all damages occasioned by injury to its passengers for which it (street railway) was liable, from the 9th of December, 1892, until its policy was canceled. The policy was not canceled by the insurance company until the twenty-third day of January, 1893. The liability sued on had supervened in the mean time. While the insurance company had the right to cancel the policy for the nonpayment of the premium, as per the contract between the parties, it had no power to make this cancellation relate back and avoid the policy ab initio. Had it not canceled the policy, but continued same in force one year, the assured would have been liable to the insurer for the entire premium. If the entire premium had been paid, and no liability had accrued between the time of the execution of the policy and the time of cancellation, the insurer might have canceled the policy, under certain conditions therein contained, by refunding the premium less the pro rata portion thereof for the time the policy was in force. If, in the mean time, a liability had accrued, ⁵⁷² cancellation without the assent of assured could only take place by refunding the premium, less the pro rata for the time the policy had been in force, and also by the payment of intervening liabilities. Now, in the present case, while the premium had not in fact been paid, credit had been extended, and, before any demand had been made for the payment of the premium, the liability accrued. The insurer also a short time thereafter canceled the policy, thus electing not to insist upon the payment of the premium. The liability of the insurance company to the street railway company at the time of the cancellation of the policy, and at the institution of this suit, exceeded the entire amount of the premium. Under such circumstance, the most that the insurance company could demand would be to have the amount of premium which had been earned while the policy was in force deducted from the amount of its liability to the assured. This the court did, and its judgment is correct.

Affirmed.

A CONTRACT OF INSURANCE is an agreement by which one person for a consideration promises to pay money, or its equivalent,

or to do some act of value to the insured upon the destruction or injury of something in which he has an interest: *Claffin v. United States Credit etc. Co.*, 165 Mass. 501; 52 Am. St. Rep. 528, and note. Contracts of indemnity are discussed in the case of *Fidelity etc. Co. v. Gate City Nat. Bank*, 97 Ga. 634; post, p. 440, and note.

INSURANCE—GENERAL AGENT—WAIVER OF CONDITIONS BY.—The general agents of insurance companies may waive stipulations and conditions contained in a policy of insurance with respect to the conditions upon which it shall go into operation, by delivering it with knowledge of the facts and receiving the premium: *Wood v. American etc. Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733, and note. An insurance agent who, under general instruction from the home office, has authority within certain territory to deliver policies and receive premiums is a general agent, and has authority to waive cash payments of premiums: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note. See, also, the note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 229.

ROBERTS v. AMERICAN BUILDING AND LOAN ASSOCIATION.

[62 ARKANSAS, 572.]

BUILDING AND LOAN ASSOCIATIONS—RIGHT TO RECOVER LOAN, INTEREST, AND PREMIUM.—If a mortgage given to secure a loan from a building and loan association provides that on default the association may elect to foreclose, not only for the loan with interest, but also for a "premium" bid by the borrower for the loan, a court of equity cannot decree for both the loan with interest and such premium. Such decree would be tantamount to enforcing a penalty for a breach of contract.

BUILDING AND LOAN ASSOCIATIONS.—THE RULE FOR COMPUTING THE AMOUNT DUE from a defaulting member on a loan from a building and loan association is to ascertain the amount of stated dues and interest which will become due during the future existence of the corporation as estimated, then find the principal, which, with interest for the supposed time, will amount to the dues and interest already calculated; and this will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale.

BUILDING AND LOAN ASSOCIATIONS—FINES AS LIQUIDATED DAMAGES.—Fines imposed on members of building and loan associations by its by-laws for failure to make monthly payments, are treated as liquidated damages, fixed by the consent of the parties, to indemnify the association for the loss it has sustained by reason of the failure of the defaulting member to make prompt payments. Fines so imposed are enforced, provided the by-law creating them is reasonable.

BUILDING AND LOAN ASSOCIATIONS.—FINES FOR NONPAYMENT OF DUES are essential to the exercise of the express powers conferred upon building and loan associations in their incorporation, and they have a right to impose them whether any express warrant is found for it in the statute of incorporation or not. They have such power by implication, but when not fixed by statute, such fines must be prescribed by the charter or by-laws of

the association in precise and unequivocal terms, so as to be readily understood by members, and they must be reasonable, or they cannot be enforced.

Action to foreclose a mortgage given to secure a loan from a building and loan association. The "fine" referred to in the opinion was imposed by the by-laws of the mortgagee, which provided that its stockholders should be liable to a "fine of ten cents per share, to be imposed for each and every month that payment is not made." Judgment for plaintiff. Defendant appealed.

C. D. James, for the appellant.

L. H. McGill, for the appellee.

579 WOOD, J. 1. The appellee was duly incorporated under the laws of Minnesota. Its articles of incorporation and by-laws, which were in evidence, show that it is a mutual building and loan association, having the same plan or scheme as that in general use by such associations. For a description of such associations, see note by Freeman in *Robertson v. American etc. Assn.*, 69 Am. Dec. 151. The purpose of this association was to exact of appellant an obligation equal to the advancement which it had made her, together with the premium which she had bid for same, the whole amount being equal to the par value of her twenty shares of stock at maturity. And this purpose it carried out, as appears from the face of the note itself and the mortgage, as well as from the testimony of witnesses. While there is testimony to the contrary, it is improbable and unreasonable. The ruling of the trial court upon the issue of non est factum was correct.

This issue, however, is immaterial. For, although the note specifies that, in case of default, the "whole amount of the note is at once due and payable," and although the mortgage gives appellee, in case of default, "the election to foreclose for the whole of said principal sum," still a court of equity would not decree for the full amount of the advancement and interest, together with the premium. Such a decree would be tantamount to enforcing a penalty for breach of contract: *Hagerman v. Ohio etc. Assn.*, 25 Ohio St. 205, 206. The evident design of the parties to this contract was to have the ⁵⁸⁰ debt discharged according to the system peculiar to building and loan associations.

This contract, then, binds the appellant to pay monthly installments of interest on the advancement, monthly dues on stock, until its maturity (not to exceed a period of nine years), and fines assessed for failure to make stock payments or dues as specified. Default having been made for more than six months

in the payment of the installments of interest and monthly dues, foreclosure proceedings were begun, and the only real question here is as to the amount of the decree.

The lower court charged the borrower with the whole amount of dues for nine years, and added to this sum the interest and fines in arrears at the institution of the suit. From this sum was deducted the amount of dues already paid on stock, and to the balance was added six per cent interest per annum from the institution of the suit to date of the decree, making the sum of \$1,260.70, for which decree was entered. Was this correct? The rule for determining the amount which we think most nearly enforces all the contract obligations is "to ascertain the amount of stated dues and interest which will become due during the future existence of the corporation, as estimated; then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale."

It was in proof, by the actuary of the association, that the stock would have matured in ninety-eight months. The date of the certificate of stock was June 11, 1888. The date of the decree was August 17, 1893. The time, therefore, for the stock to run before maturity from date of decree was thirty-five and four-fifths months. Dues, ⁵⁸¹ interest, and fines were in arrears from April 11, 1890, or forty months and six days. Then, from this data, applying the above rule, we have the following:

Dues, 35 4-5 months at \$12.00 per month.....	\$ 429 60
Interest on \$1000 (advancement) for 35 4-5 months at \$5.00 per month.....	179 00

Total.....	\$ 608 60
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Now, the principal which will amount to this sum in thirty-five and fourth-fifths months at six per cent interest is \$516.20, which is ascertained by dividing the \$608.00 by \$1,179, the principal and interest on one dollar at six per cent for thirty-five and four-fifths months. The present value of the anticipated payments then is \$516.20. To this add arrearages:

Dues 40 months at \$12.00.....	\$ 480 00
Interest 40 months at \$5.00.....	200 00
Fines 40 months at \$2.00.....	80 00

Total.....	\$1,276 20
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This sum represented the amount for which the mortgage should have been foreclosed. But the court rendered judgment for \$1,260.70, making a difference in favor of appellant of \$15.50. So it is clear that she has not been prejudiced by the decree. The above rule is that announced by the superior court of Cincinnati: *Endlich on Building Associations*, sec. 386.

The rule, as announced in a leading case in Maryland, is "to ascertain by proof the probable duration of the society, then to estimate the aggregate amount of the weekly and monthly installments payable during that time, from that sum rebate a just amount of interest, and add thereto the arrearages due, after allowing for payments made to the society, and the sum thus ascertained is the amount which the mortgagee is entitled to receive in praesenti in satisfaction of the mortgage": ⁵⁸² *Robertson v. American etc. Assn.*; 10 Md. 397, 69 Am. Dec. 145, and cases cited in note.

The application of this rule to the facts of this record would give substantially the same result as above. Either of these would be just to the borrowing member and to the association. But we prefer the former, because it gives a simple, certain, and accurate method of arriving at the amount, whereas, by the latter rule, the amount of interest to be rebated is not fixed, but such as the chancellor may deem just. The rule we have approved is announced upon the basis of a final and complete foreclosure by sale of the property mortgaged, and a termination of appellant's membership in the association. There is no intimation anywhere in the record that appellant desires, or would be willing, to continue her membership in the association. She repudiated the contract as a real building and loan contract, insisting that it only binds her to repay the amount advanced at six per cent interest, and that the mortgage only secured that amount, i. e., that the contract was for a straight loan.

2. The amount of the decree, under the rule announced, as well as the rule adopted by the trial court, includes fines for failure to make monthly payments. The by-laws authorize a fine of "ten cents per share to be imposed for each and every month the payment is not made." The success of the building and loan association scheme depends upon the certainty and regularity with which members pay their dues. Fines, strictly as such, imposed merely by way of punishment for a breach of contract, a court of equity would not enforce. But what is usually designated as "fines" in a genuine building and loan association is intended for, and does subserve, a different purpose. They are

treated by the best authorities as liquidated damages, fixed by consent of the parties, to indemnify the association for ⁵⁸³ the loss it has sustained by reason of the failure of the defaulting member to make prompt payments: Shannon v. Howard etc. Assn., 36 Md. 383; Ocmulgee etc. Assn. v. Thomson, 52 Ga. 427; 2 Am. & Eng. Ency. of Law, 620, and authorities cited.

Dues being the vitalizing principle in the whole plan, and the measure of the prosperity of the whole depending upon the promptness with which each member discharges his obligations to every other to pay them, it is but just that each delinquent may contract as far as possible to make good the loss occasioned by him.

In most of the states, the legislature, recognizing that some such power is indispensable to preserve the equality of burdens, while each is sharing equally in the profits, has enacted laws providing for the imposition of fines. But, in the absence of such statutes, it is within the province of a court of chancery to enforce such an essential regulation, when adopted by the association. Those who become members or stockholders of an association having such a by-law, of course, approve and accept same, and should be bound thereby, provided said by-law be reasonable: Endlich on Building Associations, 415; Shannon v. Howard etc. Assn., 36 Md. 383.

Mr. Endlich, speaking of a member who defaults in the payment of dues, says: "He will be getting an advantage over and above his fellows; he will have had the use of his subscription money for a longer period than they had theirs, and, besides, he will have his proportionate share of the gains made upon all their prompt payments, whilst he will lose only the trifling amount that would have come to him as his proportionate share of the profits, which, if he had paid his dues properly, would have accrued from such payment in the interval between the day when it was his duty to make it and that upon which he did make it. It follows that the ⁵⁸⁴ society is, in good conscience, entitled to be made whole for the injury resulting from tardy payments": Endlich on Building Associations, sec. 412. In Goodman v. Durant etc. Assn., 71 Miss. 310; Chief Justice Campbell said: "What is called a fine (merely an agreed sum as liquidated damages) is imposed for every default in payment, as a spur to prompt payment, so as not to derange the process of compounding, which must fail if there is want of payment as agreed, and failure of which would cause failure of the scheme. We see nothing wrong in members of full age and compos mentis mutually binding themselves to so beautiful a scheme for recip-

cal advantage, and being held to the performance of what they had agreed." Mississippi, like Arkansas, has no statutes on the subject.

We are aware that some courts regard fines as penalties, and will not lend their aid to enforce them, independent of statutory enactment: *Lincoln etc. Assn. v. Graham*, 7 Neb. 173; *Lincoln etc. Assn. v. Benjamin*, 7 Neb. 181; *Jarrett v. Cope*, 68 Pa. St. 67; *Link v. Germantown etc. Assn.*, 89 Pa. St. 15. But the rationale of the doctrine of fines for the nonpayment of dues is, that they are essential to the proper exercise of the express powers conferred upon building and loan associations in their incorporation. And therefore they have the right to impose them, whether any express warrant is found for it in the statute under which they are incorporated or not. They have such power by implication: *Endlich on Building Associations*, sec. 417; *Goodman v. Durant etc. Assn.*, 71 Miss. 310.

It has been suggested that the menace of foreclosure, which overhangs the borrower in case of default, is a sufficient stimulus to promptness, and that, therefore, the by-law imposing fines is unnecessary, and should not exist. But the investor has no such stimulus ⁵⁸⁵ to enforce punctuality on his part. The imposition of fines for nonpayment of dues must apply to every member alike—the investor as well as the borrower.

The power to impose fines, however, if unrestrained, might be abused, and thus cause injustice and oppression. Therefore, courts of equity, operating with or without the sanction of the statute, will see that fines are reasonable in amount, and equitable in every respect, having in view the object to be attained by them. They must be prescribed by the charter or by-laws, in precise and unequivocal terms, so as to be readily understood by the members: *Endlich on Building Associations*, secs. 419-422; *Occidental etc Assn. v. Sullivan*, 62 Cal. 394; *Davis on Law of Building and Loan Societies*, 36; *Mulloy v. Fifth Ward Bldg. Assn.*, 2 McAr. 594. The by-law under consideration conforms to these requirements.

Since the decree is for a sum less than it might have been, under the rule announced, it is unnecessary for us to determine whether the small interest on fines included in the decree is error. If so, it was not prejudicial.

Affirmed.

BUILDING AND LOAN ASSOCIATIONS.—ASCERTAINING AMOUNT DUE ON MORTGAGES is discussed in the extended note to *Robertson v. American etc. Assn.*, 69 Am. Dec. 163.

BUILDING AND LOAN ASSOCIATIONS—RIGHT TO IMPOSE FINES.—The Pennsylvania general law, act of 1859, confers no special power upon building associations incorporated thereunder to impose fines; and the general authority of such association, in this respect, is limited to such fines as are imposed under by-laws which are reasonable and lawful: *Lynn v. Freemansburg Building etc. Assn.*, 117 Pa. St. 1; 2 Am. St. Rep. 639. But, on this subject, see the extended note to *Robertson v. American Building etc. Assn.*, 69 Am. Dec. 153.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

CRAIG v. HESPERIA LAND & WATER COMPANY.

[113 CALIFORNIA, 7.]

CORPORATIONS—LIEN UPON STOCK FOR DELINQUENT ASSESSMENT—TRANSFERS DURING DELINQUENCY. A corporation has no lien upon certificates of stock on account of delinquent assessments. The lien is upon the shares alone; and the corporation has no power to prevent a transfer of such certificates, although the shares remain subject to such lien and the new owner takes subject thereto without affecting the identity of the stock; and the corporation may enforce its delinquent assessment upon the shares regardless of the number of transfers made subsequent to the assessment.

CORPORATIONS—NEGOTIABILITY OF CERTIFICATES OF STOCK—TRANSFER SUBJECT TO EQUITIES.—A certificate of stock in a corporation is non-negotiable, and a purchaser thereof takes subject to all equities in favor of the corporation, regardless of want of notice of such equities.

CORPORATIONS—CONVERSION OF STOCK—REFUSAL TO TRANSFER.—A corporation refusing to transfer its stock to a purchaser and to issue a new certificate therefor is liable for conversion. The fact of delinquent assessments against such stock is no defense, though proof of them is admissible as affecting the value of the stock sued on.

H. A. Barclay, for the appellant.

Graves, O'Melveny & Shankland, for the respondent.

⁹ **HAYNES, C.** Action for the conversion of stock in a corporation. Defendant is a corporation organized under the laws of this state. On November 18, 1893, plaintiff was the owner of fifty shares of stock in the defendant corporation, represented by certificates numbered 72 and 79, each for twenty-five shares. These certificates were in defendant's possession. On the day above mentioned, plaintiff, having agreed to sell forty of said shares to one Kaelin, offered to indorse and deliver said certifi-

cates to the corporation, and demanded that forty shares thereof be transferred to said Kaelin, and new certificates issued, one to Kaelin for forty shares, and one to himself for the remainder. This demand was refused for reasons about which there was some controversy, though it is reasonably clear that the only reason given for not complying with the demand was that the stock was "in litigation." On November 20th, two days after the demand, this action was brought.

The defense to the action is based upon the claim that the stock in question is liable for certain unpaid assessments. The court refused all the instructions requested by the plaintiff, and instructed the jury to return a verdict for the defendant. This appeal is from the judgment ¹⁰ and an order denying plaintiff's motion for a new trial.

A chronological statement of the assessments made, and of the holdings of the shares in question, will simplify the facts and the questions made.

In 1890 an informal or voluntary call was made of seven dollars per share, and all the stockholders paid except Samuel Merrill, who then owned fifty shares represented by certificate No. 26.

On December 9, 1892, assessment No. 4 was made of ten dollars per share. This assessment was made to cover and include the voluntary assessment of seven dollars per share, Samuel Merrill not having paid his proportion, amounting to three hundred and fifty dollars, the intention being to credit all the others with the voluntary payment, and requiring them to pay three dollars per share in addition, and the Merrill stock to pay ten dollars per share.

Prior to that assessment, on November 23, 1892, Samuel Merrill sold and transferred twenty-five shares of his stock to the plaintiff, John W. Craig, and twenty-five shares to J. H. Merrill, and certificate No. 71 was issued to Craig and certificate No. 72 was issued to J. H. Merrill. After that assessment became delinquent Craig and Merrill brought an action to cancel said assessment No. 4, and obtained a restraining order to prevent the sale. Afterward, a nonsuit was granted in that action, and plaintiff's motion for a new trial thereof was denied on November 17, 1893.

On September 20, 1893, at a delinquent sale under assessment No. 5, Merrill not having paid the assessment, Craig bought his stock, and a new certificate, No. 79, was issued to plaintiff.

On October 19, 1893, assessment No. 6 of one dollar per share was ordered, to become delinquent November 17th, and the day of sale was fixed for December 6, 1893. This assessment was

not paid by the plaintiff, and became delinquent the day before plaintiff's demand for the transfer of his stock was made, though it appears ¹¹ that plaintiff had no knowledge of that assessment until after this suit was commenced, when he received notice of the delinquency. He was not informed of it by the company when his demand was made, and the refusal to transfer the stock was then based upon the statement that the stock was "in litigation," referring to the suit of Craig and Merrill against the corporation to enjoin assessment No. 4.

Assessment No. 4 upon certificates 71 and 72 remained unpaid at the commencement of this action, but under a subsequent assessment, which was paid by 71, No. 72 was sold, and plaintiff became the purchaser, and a new certificate, No. 79, was issued to him; and it is conceded by the respondent that, as to the shares represented by that certificate, they were discharged as to assessment No. 4, so that that assessment now affects only twenty-five shares, while the last assessment, No. 6, affects the whole fifty shares.

The record is silent as to any provision in the by-laws of the corporation affecting the question, nor is there any express provision of the statute permitting or prohibiting the transfer of certificates of stock upon the books of the corporation during delinquency; and the question to be determined is, whether the corporation, by a transfer of plaintiff's shares after an assessment thereon became delinquent, affected its right to enforce its assessment against the shares so transferred.

Respondent contends "that, after an assessment and before delinquent sale, the assessment not having been paid, a transfer of delinquent shares to a stranger would entirely defeat the power of the authority of the corporation to collect its dues in the manner provided for in the Civil Code."

In support of this contention, counsel argue that "the corporation had a lien (or the equivalent of a lien, so far as holding appellant to his status as a book owner of the shares), which appellant could not defeat by diverting the shares into a new channel of ownership beyond the reach of the corporation."

¹² The lien, however, is upon the shares, and not upon the certificate. The certificate is merely evidence of ownership of the shares. When an old certificate is surrendered, and a new certificate is issued, the new certificate represents the same shares, but the shares themselves remain subject to any lien the corporation may have upon them, and the new owner takes subject to such lien. The identity of the stock is not affected by the transfer: *Hawley v. Brumagim*, 33 Cal. 394; *Atkins v. Gamble*, 42 Cal.

99, 100; 10 Am. Rep. 282. The keeping of a stock-book, in which the original issue and all subsequent transfers must be entered, enables the holder or purchaser to trace his shares back to the original issue by the numbers of the different certificates, and thus identify the shares upon which any assessment has been made, and enables him to ascertain with certainty, in connection with the other records of the corporation relating to assessments and delinquent sales, whether his shares are free from liens or liability in favor of the corporation, and, in the same manner, enables the corporation to enforce its delinquent assessment upon the shares liable therefor, no matter how many transfers have been made subsequent to the assessment, each transferee taking the legal title, but subject to the assessment, just as the grantee of the legal title to land takes it subject to all valid recorded liens. If respondent's contention is sound, it must follow that transfers upon the books must cease when the assessment is made, for any or all of the shares assessed may become delinquent; and it would also follow that if an assessment were made which stockholders generally regarded as illegal, and they should contest the same in the courts, they would be obliged, pending the litigation, however protracted it might be, either to hold their stock subject to all the liabilities of a "bookholder" until the end of the litigation, or pay an unjust or illegal assessment. Such ruling would improperly and unjustly interfere with the disposition of property by the owner, and would not add to the security of the corporation ¹³ in the collection of delinquent assessments. A certificate of stock is not a negotiable instrument: *Barstow v. Savage Min. Co.*, 64 Cal. 388; 49 Am. Rep. 705; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 304; *Swim v. Wilson*, 90 Cal. 129; 25 Am. St. Rep. 110. In analogy to other non-negotiable instruments, a purchaser would take subject to all equities in favor of the corporation; but whether a transferee upon the books would take his stock discharged of any lien undisclosed by the corporation at the time of the transfer and the issuance of a new certificate need not now be determined, nor do I think it was determined in the case of *Craig v. Hesperia Land etc. Co.*, 107 Cal. 675 (the pleadings in which case are set out in the record in this case), inasmuch as it may have been held in that case that the voluntary payment of seven dollars per share was regarded as an indebtedness of the corporation to the contributors, and that assessment No. 4 was made to meet that and other liabilities.

If, then, the transfer of plaintiff's shares upon the books of the corporation, and the issuance of new certificates, would not have affected the power of the corporation to collect the delinquent

assessment on such shares by a sale thereof, such delinquency did not justify the refusal to make the transfer, and plaintiff's objection to evidence of those facts set up in the answer, if offered as a full defense to the action, should have been sustained; though proof of the unpaid delinquent assessment would have been admissible as affecting the value of the stock; and it also follows that the court erred in instructing the jury to find for the defendant.

Ranch Land etc. Co. v. Herberger, 82 Cal. 603, cited by respondent, sustains the views we have expressed. I can discover no difference between the right of a corporation to collect a valid assessment, and its right to collect a stipulated part of the subscription to stock, nor how the nonpossession of the certificate affects that right in either case. In Mandelbaum v. North American Min. Co., 4 Mich. 465, cited by respondent, the question arose ¹⁴ between a stockholder who had lost his certificate, to which was attached a blank power of attorney for its transfer signed by the original holder, of whom the loser purchased it, and the vendee of the finder who had purchased it in good faith, and to whom the company issued a certificate after notice of the loss by the true owner. It was there held that the holder of a certificate so indorsed and transferred is entitled to the same rights respecting it as against third parties, which the law confers upon the holder of commercial paper. It is obvious that a broad distinction exists between that case and this. The corporation there might well be estopped to deny the title of one to whom it transferred the stock after notice of the loss; but that does not touch the question of its right to enforce a delinquent assessment notwithstanding the transfer. In this state neither the finder of an indorsed certificate nor his vendee would acquire any right to the stock: Sherwood v. Meadow Valley Min. Co., 50 Cal. 412.

The fact that plaintiff did not know of the assessment at the time he demanded the transfer, nor at the time suit was commenced, does not affect the validity of the assessment nor the liability of the stock therefor; but it is evident that if respondent's contention is sound the holder of stock may not only be deprived of the benefit of an advantageous sale, which he would desire to make under any circumstances, but he would be denied the right to dispose of his stock to avoid personal liability for debts about to be incurred which he did not approve, and which in his judgment would be ruinous not only to the corporation, but to himself as a stockholder.

The judgment and order appealed from should be reversed.

quest from his principal, is not entitled to relief under a mortgage given to secure him against liability as such surety.

USURY—CLAIM TO SUBROGATION growing out of an agreement void by reason of usury furnishes no basis for equitable relief.

Action to recover the amount of principal and interest due on a note and to foreclose mortgages.

E. P. Watson, for the appellant.

J. A. Rice, for the appellees.

⁹⁷ HUGHES, J. Without setting out the evidence in detail, we deem it sufficient to say that we have carefully read and examined it, as set out in the bill of exceptions in the case, and think that the preponderance of it sustains the finding of the chancellor that the note given by Roe and Kiser to Felker, and the mortgage given by Kiser to Roe, were usurious and void; it having been shown by parol evidence that, though the note was given to bear interest at the rate of ten per cent (which is the highest lawful conventional rate of interest in this state), yet there was, at the time the contract for the loan was made and the note was given, a verbal agreement that Kiser and Roe should pay twenty per cent interest per annum upon the money forborne to them by Felker, and ⁹⁸ that this agreement was understood and entered into by both Kiser and Roe. This certainly made this contract and agreement usurious and void.

This is a case where the contract and agreement was illegal—prohibited by law—and its terms rested partly in parol and partly in writing. It is objected that parol evidence could not be heard to contradict or vary the terms of the written contract, which was for ten per cent interest per annum only. It is a well settled and recognized general rule that parol evidence cannot be admitted to contradict or vary the terms of a written agreement. But this rule is not without exceptions. This rule assumes that the instrument has a legal existence, and is valid. Testimony to show it to be void is always pertinent. Illegality of an agreement may be shown, to avoid a writing purporting to evidence it: See 2 Phillips on Evidence, 684, note 500, and authorities there cited, and note 495, p. 673, and cases cited; *Wilhite v. Roberts*, 4 Dana, 175.

“In an action on a note, the defendant may show a distinct parol agreement, made at the time the note was given, to pay usury upon the demand secured by the note, and thus avoid it”: *Hammond v. Hopping*, 13 Wend. 510, 511; *Lear v. Yarnel*, 3 A. K. Marsh. 420.

The written contract cannot have the effect, in such cases, of merging the parol contract, "for it is only in virtue of its superior obligation that a written contract has the effect of extinguishing the verbal contract upon which it is founded": *Lear v. Yarnel*, 3 A. K. Marsh. 421; *Allen v. Hawks*, 13 Pick. 79; *Levy v. Brown*, 11 Ark. 16. In *Levy v. Brown*, 11 Ark. 16, this court said: "With respect to the admissibility of parol evidence to prove the contract, there can be no doubt; for it is well settled that any matter which shows that a security is void on the ground of its being usurious ⁹⁹ may be averred and proved, however contrary it may be to the terms of the security" (quoting from the *Kentucky case*). The court further said: "An agreement to pay more than legal interest for money loaned on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the amount lent, with the illegal interest only." But if the parol agreement to pay the illegal interest be made after the time of the loan, it would not make the note usurious: *Merrills v. Law*, 9 Cow. 65.

The next question is, Did the court err in rendering a personal judgment against Kiser, and declaring a lien in favor of the plaintiff Roe upon the forty-acre tract of land described in the mortgage from Burrestetta to Nance, and ordering the same sold to satisfy the judgment? The claim of Roe to have this decree was based upon the fact that he had become the surety of Kiser on the note of Kiser to Felker to settle the note given by Nance to Felker, and had taken a mortgage from Kiser to secure him against the payment of the note Kiser had given to Felker with Roe as security, and that he (Roe) had paid said note, and was entitled to enforce the security which Felker had held against Nance, and which had been paid off by the note of Kiser and Roe. The note given by Kiser and Roe to Felker and the mortgage by Kiser to Roe were usurious and void. There was no legal obligation upon either Kiser or Roe to pay the note they had given Felker, and the evidence does not show that Kiser requested Roe to pay the same, but tends to show that he did it voluntarily, knowing that it was usurious and void. This he had no right to do, and thus make Kiser liable to pay the note which he was not legally bound to pay. Had Kiser requested Roe to pay this note, a different question would be presented. As Roe's right to relief against Kiser depended upon the ¹⁰⁰ unlawful transaction in making the usurious agreement by himself and Kiser with Felker, he was not entitled to any relief. He could have no right upon this unlawful and prohibited agree-

ment, and he had no right that he did not seek to trace through and base upon this transaction.

In *Tribble v. Nichols*, 53 Ark. 273, 22 Am. St. Rep. 190, this court, through Chief Justice Cockrill, said: "The general rule is well established that one who, at the request of another, pays off an encumbrance upon the latter's land, is entitled to be subrogated to the security; and it is also a settled rule that when a valid security is canceled by means of a subsequent agreement and security which is void for usury, the original security is not invalidated, but equity will revive and enforce it." But "one who seeks protection under the equitable doctrine of subrogation must come into court with clean hands. It is not applied to relieve one of the consequences of his own wrongful or illegal act. When, therefore, the claim to subrogation grows out of an agreement which is void by reason of usury, it furnishes no basis for the equitable doctrine."

So much of the decree of the circuit court in chancery as holds the note given by Kiser to Roe void for usury is affirmed. But so much of it as declared a lien in favor of Roe upon the forty-acre tract described in the mortgage from Burrestetta to Nance, and the personal judgment against Kiser, is reversed, and the bill is dismissed for the want of equity.

Bunn, C. J., dissents.

IN THE SUBSEQUENT CASE of *Hynes v. Stevens*, 62 Ark. 491, the supreme court decided that a mortgage given to secure a legal and valid debt is not rendered illegal by a subsequent agreement that it shall also stand as security for a subsequent usurious debt between the same parties.

USURY—VERBAL AGREEMENT.—A note bearing legal interest on its face, but executed in connection with a parol agreement under which additional and unlawful interest is paid thereon in advance until its maturity is usurious: *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518, and note. See, also, the extended note to *Bank v. Cook*, 46 Am. St. Rep. 191.

USURY.—PAROL EVIDENCE IS ADMISSIBLE to show the usurious consideration of a note: *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518.

EVIDENCE—PAROL TO SHOW INVALIDITY OF CONTRACT.—The rule forbidding the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law: *Friend v. Miller*, 52 Kan. 139; 39 Am. St. Rep. 340.

PIKE v. THOMAS.

[62 ARKANSAS, 223.]

EXECUTORS AND ADMINISTRATORS—POWER TO BIND ESTATE.—An administrator has no power to bind an estate by his individual contracts.

EXECUTORS AND ADMINISTRATORS.—AN ATTORNEY EMPLOYED BY AN ADMINISTRATOR of an estate has no claim against it for his services, although they may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him.

COURTS OF PROBATE—JURISDICTION.—A probate court has no jurisdiction of a claim against an estate for services rendered by an attorney employed by the administrator to prosecute a suit in the interest of such estate.

Action by an attorney against the estate of a decedent to recover a claim for services rendered while in the employment of the administrator of such estate in prosecuting an action to recover a claim in behalf of the estate. The plaintiff recovered a judgment, but being dissatisfied with the amount thereof, appealed.

Dodge & Johnson, for the appellant.

226 WOOD, J. This court has repeatedly held that an administrator has no power to bind the estate he represents by his individual contracts. The last announcement upon the subject was in an opinion delivered by Judge Riddick, at the present term, in *Tucker v. Grace*, 61 Ark. 410, where he said: "An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." It was there also said to be the "proper practice, where the administrator refuses to pay for such services, for the attorney to bring suit against him individually, and not in his representative capacity": *Tucker v. Grace*, 61 Ark. 410, and authorities there cited.

In *Turner v. Tapscott*, 30 Ark. 312, the learned judge, in drawing the distinction "between contracts for services which should be charged against an estate as costs of administration and such as render the administrator liable," held that the fees of an attorney who, under contract with the administrator, rendered services beneficial to the estate, were a proper charge against the estate; for, said Judge Walker, "if fees, under such circumstances, are to be held as a personal charge upon the administrator, no counsel would be employed, and the estate would be wasted." In *Yarborough v. Ward*, 34 Ark. 208, Judge Eakin

commenting upon the language of the judge in *Turner v. Tapscott*, 30 Ark. 312, said: "The court sanctions by implication the practice of ²²⁷ presenting the claim to the probate court, not for allowance and classification, but for the purpose of obtaining an order on the administrator to pay the same as expenses of administration, leaving only the surplus of assets to go to the claims properly allowed against the estate." Continuing, says Judge Eakin: "It is certainly the duty of the administrator to pay such claims, and, if he does so, he will be allowed a credit on settlement. Should he refuse, it is certainly within the scope of the general powers of the probate court, in its control over the conduct of the administrator, to order him to do so upon proper application in the case, and to enforce its order. The remedy of the party may, in this case, as in many others, be cumulative." It was unnecessary in either of the above cases for the court to approve, either expressly or by implication, the practice for creditors of the administrator to come into the probate court to establish their claims against him. The point was not before the court in either case. We cannot agree with the learned judge that the rule as above announced in *Yarborough v. Ward*, 34 Ark. 208, is a wholesome one. Whatever merit of expedience or convenience such a practice may seem to possess, it is not sanctioned by the weight of authority, and confers a jurisdiction not given by our constitution or statutes. If the administrator is individually liable, the only authorized procedure is for those who have contracted with him to go into the proper forum at law or equity, as the nature of their claim and the remedies to be applied may suggest, and there have the amount of his liability determined. We are not called upon to determine into which court appellant should have gone to have his claim adjudicated. The following authorities, however, may afford some useful suggestions on that subject: *Ferrin v. Myrick*, 41 N. Y. 315; 2 *Woerner's American Law of Administration*, sec. 758; *Clapp v. Clapp*, 44 Hun, 451. But the probate court has no power to render ²²⁸ and enforce a judgment against the administrator for an individual liability.

Mr. Woerner says: "Although it may be the duty of the court, in passing upon the administration account, to determine the reasonableness of payments for such services, and allow or reject the credits taken therefor, it has not the power, unless expressly granted by statute, to adjudicate upon the claims of such persons against the administrator. Their remedy, if he refuse to pay, is in another court": 1 *Woerner's American Law of Administration*, sec. 152; 2 *Woerner's American Law of Administration*, sec.

356. Also the following: *Ferrin v. Myrick*, 41 N. Y. 315, and authorities cited; *Rice's American Probate Law*, 442; *Kowing v. Moran*, 5 Demarest, 59.

So much of the opinions in *Turner v. Tapscott*, 30 Ark. 312, and *Yarborough v. Ward*, 34 Ark. 208, susceptible of being construed as approving any other rule, is overruled.

It follows that the circuit court had no jurisdiction to render the judgment in this case, and the same is therefore reversed, and the cause is remanded without prejudice.

EXECUTORS AND ADMINISTRATORS—POWER TO BIND ESTATE.—Estates are not liable at law for the contracts of executors or administrators: Exhaustive note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 119-135.

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR ATTORNEY'S FEES.—Attorneys at law may be employed to assist and advise executors and administrators, who, on their part, are entitled to be compensated for moneys necessarily paid for such services. The duty of compensating the attorney rests primarily on the executor or administrator, who is liable to a personal action therefor: Extended note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 122. See, also, the extended note to *Lucich v. Medin*, 93 Am. Dec. 393-397.

FLETCHER v. ARKANSAS NATIONAL BANK.

[62 ARKANSAS, 265.]

EVIDENCE.—CERTIFICATE OF PROTEST by a notary public of another state attested by his seal is *prima facie* evidence that the acts indicated were done by the notary.

C. D. Greaves, for the appellant.

Wood & Henderson, for the appellee.

²⁶⁶ BUNN, C. J. This was a suit on a protested check, issued by Bonner & Bonner of Tyler, Texas, to appellant Fletcher, on Kountze Brothers, New York, for one hundred and fifteen dollars, ²⁶⁷ indorsed by Fletcher, sold for cash to appellee bank, and protested for nonpayment on presentation in New York. Judgment for plaintiff.

The contention of appellant is, that there was no proof of sufficient protest in New York, and also that there is no proof of notice of protest to him, nor of due diligence in giving him the notice thereof. The court found against him in both issues, and we will not disturb its findings. The certificate of protest was sufficient, and the attestation by seal was also sufficient to make a *prima facie* case that the acts indicated had been done by the n. t.

ary. The certificate of the fact that due notice was given appellant was wanting, but the fact was established by extraneous evidence, and we think also that all proper diligence was used in giving the notice to him.

The judgment is therefore affirmed.

EVIDENCE.—NOTARIAL PROTESTS of foreign bills are received in evidence as making proof of themselves, and bills drawn from one state on another are regarded as foreign bills to this extent; but beyond this the acts of foreign notaries or of notaries of other states are not admissible in evidence without proof of the signatures and capacity of the notaries: *Schneider v. Cochrane*, 9 La. Ann. 235; 61 Am. Dec. 204. The certificate of a notary is prima facie evidence of the facts therein set forth under the California statute: *Fogarty v. Finlay*, 10 Cal. 239; 70 Am. Dec. 714.

HARKEY v. MECHANICS' AND TRADERS' INSURANCE COMPANY.

[62 ARKANSAS, 274.]

CONTRACTS—RESCISSION OF SETTLEMENT.—An insured, after accepting a sum of money in settlement of a disputed loss, cannot rescind such settlement on the ground that it was procured by fraud, without first returning the money received.

W. D. Jacoway, for the appellant.

S. R. Allen and E. W. Kimball, for the appellee.

277 RIDDICK, J. The only question for us to determine is, whether under the facts as stated in the complaint, it was necessary for the plaintiff to return, or offer to return, the money received by him upon the compromise agreement, before commencing his action at law upon the policy of insurance.

The complaint alleges that one Miles, the agent of the company, claimed that the policy had been forfeited "in divers ways, and that plaintiff could not recover anything at law." It also alleges that he stated to plaintiff that, if the offer of compromise was not accepted, "the defendant company would never pay him a cent, and would prosecute him to the bitter end." These allegations show that this was a disputed claim. The company, through its agent, asserted that the policy had been forfeited, but offered a compromise, which plaintiff accepted. He agreed to receive, and did receive one hundred dollars in full settlement of his claim against the company, and gave his receipt to that effect. He understood the nature and effect of the compromise, and knew the contents of the instrument that he signed. **278** Under these cir-

cumstances, as was said in a similar case by the supreme court of Massachusetts, the settlement and discharge, "although obtained by the false and fraudulent representations, constitutes a good defense until rescinded and avoided by a return of, or an offer to return, the money paid by the defendant to obtain it": *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Home Ins. Co. v. Howard*, 111 Ind. 544; *Vandervelden v. Chicago etc. Ry. Co.*, 61 Fed. Rep. 54.

This is not a case where a debtor compromises with his creditor by the payment of a part of an undisputed debt in satisfaction of the whole, nor is it a case where a party has been induced by fraud to sign a release of his claim through ignorance of the character and contents of the instrument signed. In each of these cases a different rule would apply: *Reynolds v. Reynolds*, 55 Ark. 373; *Mullen v. Old Colony R. R. Co.*, 127 Mass. 89; 34 Am. Rep. 349. This case rests on the rule that one who receives money or property in consideration of making an agreement, and afterward seeks to avoid and hold for naught such agreement, must first give back to the other party the consideration received: *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Home Ins. Co. v. Howard*, 111 Ind. 544; *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Bowden v. Spellman*, 59 Ark. 259; *Desha v. Robinson*, 17 Ark. 240.

The plaintiff had no right of action at law upon his policy until he had rescinded the agreement annulling such policy by offering to return the money received from defendant upon such agreement.

Our opinion is, that as the facts stated appear in the complaint, the judgment of the circuit court is correct and it is affirmed; but the judgment of dismissal is without prejudice to a future action.

Bunn, C. J., dissents.

In the case of *St. Louis etc. Ry. Co. v. Selman*, 62 Ark. 342, the supreme court decided that a person who accepts a less sum than is due him in the full settlement of a claim for damages, and gives a receipt in full, cannot rescind the settlement and recover the full amount of damages claimed by him, when it transpires that he is compelled to refund a part of the sum received by reason of a mistake on the part of the party liable, in including in the sum paid an amount in excess of such claim, belonging to another party by the same name as the claimant.

CONTRACTS—RESCISSION—RETURN OF CONSIDERATION. A party electing to rescind a contract must restore what he has received under it, or pay its value as a prerequisite condition: *Woodbury v. Woodbury*, 47 N. H. 11; 90 Am. Dec. 555; *Hunt v. Turner*, 9 Tex. 385; 60 Am. Dec. 167; *Springs v. Gage*, 13 Ill. 610; 56 Am. Dec.

476; *Masson v. Bovet*, 1 Denlo, 69; 43 Am. Dec. 651, and note; *Evans v. Gale*, 17 N. H. 573; 43 Am. Dec. 614. In an equitable action to rescind a settlement or compromise, it is sufficient for the plaintiff to offer in his complaint to restore what he has received. After such offer the rights of the parties will be regulated by final judgment: *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548. See, also, the extended note to *Johnson v. Evans*, 50 Am. Dec. 674.

GERMAN AMERICAN INSURANCE CO. v. HUMPHREY.

[62 ARKANSAS, 349.]

MORTGAGES—SATISFACTION.—If a chattel moragage is paid off and canceled, this is sufficient to remove the encumbrance without an entry of record of satisfaction of the mortgage.

INSURANCE — ENCUMBRANCES — FORFEITURE. — An encumbrance put upon insured property in violation of the policy of insurance suspends and avoids it, although such encumbrance is paid off before the loss occurs.

INSURANCE—POWER OF AGENT TO WAIVE FORFEITURE.—An insurance agent, furnished by his principal with blank applications and with policies, duly signed by the company's officers, and who has been authorized to take risks, to issue policies by simply signing his name, to collect premiums, and to cancel policies, without consulting his principal, is empowered to waive conditions of forfeiture in such policies for encumbrances placed upon the insured property. He may waive such forfeiture by parol, notwithstanding the limitations upon his power contained in the policy.

INSURANCE—POWER OF AGENT TO WAIVE FORFEITURES.—A clerk of an insurance agent, without authority to make contracts of insurance, or to sign insurance policies, and not in any way held out to the public as having such authority, has no implied power to waive forfeitures of policies.

Rose, Hemingway & Rose, for the appellant.

A. T. White and Bridges & Woolridge, for the appellee.

349 WOOD, J. 1. The plaintiff sued upon a fire insurance policy, for the loss of certain hotel furniture. The defense was based upon alleged noncompliance with ³⁵⁰ the terms of the policy, which provided "that if the subject of the insurance be personal property, and be or become encumbered by a chattel mortgage," the policy should be void. The property covered by the policy was mortgaged after the issuance of the policy. But the plaintiff contends that the policy was only suspended during the continuance of the mortgage, and was revived by the discharge of the mortgage before the loss occurred. There was proof, though meager, to support the finding that the mortgage was canceled before the fire, although the record was not satisfied until after. The satisfaction of the record was not essential to the removal of the encumbrance. If the mortgage was paid off and canceled, it was sufficient: *May on Insurance*, sec. 292; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188; *Smith v.*

Niagara Fire Ins. Co., 60 Vt. 682; 6 Am. St. Rep. 144; Merrill v. Agricultural Ins. Co., 73 N. Y. 452; 29 Am. Rep. 184.

But the proposition that the encumbrance, while it existed, only suspended the policy, contravenes the unambiguous terms of the contract, which the parties themselves have made. The language of the clause quoted *supra*, in its plain, ordinary, and popular sense, indicates a total extinction of the policy if the property be encumbered, and not a suspended animation thereof, subject to be revived upon payment of the mortgage debt. Courts, by interpretation, cannot ingraft upon insurance contracts, any more than upon any other, a meaning totally foreign to that which the plain terms employed by the parties themselves convey. It is undoubtedly true that where the contract, on account of any ambiguity in the language used, is reasonably susceptible of different constructions, that construction should be adopted most favorable to the insured: *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452; 1 *May on Insurance*, secs. 175, 176, and authorities cited.

351 The insurer has the right to contract against any possible risk of loss or embarrassment incident to encumbering the property insured. If it be said that, where the mortgage is paid off, there is no longer an encumbrance and increase of risk, still as to whether or not the mortgage had been paid off would be the question, and one that often could not be settled without expensive litigation. The insured mortgagor might enter into collusion with the mortgagee to defraud the insurance company after the loss occurred by claiming that the mortgage had been paid off and discharged, when in fact it had not. Unfortunately, all men are not honest. Without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer. Doubtless some such considerations as these prompted the clause in the policy under consideration. The clause is reasonable and clear, and the parties had the right to thus contract. The opinion in *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, and the numerous authorities there reviewed, leave no doubt of the correctness of our ruling. *Contra*, counsel cite *May on Fire Insurance*, at page 589, section 294, where he says: "An encumbrance in violation of the policy only suspends it, and, if paid before the loss, the policy revives"; and the learned author cites *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513. An examination of that case will show that, after the mortgage had been paid off, the insured assigned the policy, and the company indorsed upon it its assent

to the assignment. This was tantamount to the issuance of a new policy. It was a waiver of forfeiture. So the case cited does not support the text.

2. It is also contended by the appellee, that, if there was a forfeiture, it was waived by an agreement of the plaintiff with John L. Mills, clerk of the local agent, to the effect that the assured should see the mortgagee, and ³⁵² have the mortgage canceled, and that the policy should remain in force. The appellee says that said agreement on his part was performed before the loss occurred. Such an agreement, if made by one having authority, would be a waiver of the forfeiture: *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 304. Since counsel for appellants have not questioned here the sufficiency of the evidence to prove such an agreement, we will treat the verdict as conclusive on that point. Appellant questions only the authority of the clerk of the local agent to make such agreement. The testimony as to the authority of the agent and his clerk is related by John L. Mills as follows: "R. H. M. Mills is my father, and I am a clerk in his office. I never make any agreement about insurance, other than the conditions in the policy. The only contract we have is the policy. I am not a partner with my father, but only a clerk. I merely sell the policies, and receive the premiums. My brother and I merely do the office work for my father. I have no authority from the German-American Insurance Company. My father has never appointed me subagent for them. I have no power, from the agent or otherwise, to alter any of the terms of the printed contracts, nor to make any changes in a policy of insurance. I have no power to sign policies, but they are all signed by my father. I solicit insurance, and fill up blank policies for my father's signature. I filled up this one. This policy is signed by my father, who is the only person authorized to sign it. I am simply a soliciting agent and clerk, without any authority to modify the contract embodied in the policy."

The policy provides that "no agent shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions or conditions no agent shall have such ³⁵³ power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured, unless so written or attached."

Under the express terms of the policy, the placing of a mort-

gage upon the property ipso facto avoided the policy. The forfeiture thus created could only be waived by one who had authority to do so, and authority, too, as high as that by which the contract was made in the first instance: *Hamilton v. Aurora Fire Ins. Co.*, 15 Mo. App. 59.

There is a marked distinction between a waiver of conditions made before and those made after the issuance of a policy. But an agent who has been furnished by his principal with blank applications, and with policies duly signed by its officers, and who has been authorized to take risks, and to issue policies by simply signing his name, to collect premiums, and to cancel policies—all without consulting his principal—would certainly be empowered to waive the condition as to encumbrance either before or after the issuance of the policy. And he could waive the forfeiture by parol, notwithstanding the limitations upon his power in this respect contained in the policy: *Insurance Co. v. Brodie*, 52 Ark. 11, and authorities cited; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62, and authorities cited; *Fireman's Fund Ins. Co. v. Norwood*, 69 Fed. Rep. 71; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532.

If R. H. M. Mills, the local agent, possessed this power, there is nothing in the record to show that he exercised it himself, or that he assented to its exercise by his son. If he could delegate such power to his subordinate, the undisputed proof shows that he has not done so. The work of John L. Mills, as he shows, was ³⁵⁴ clerical and special. There was nothing in the nature of his employment, or in the manner of the discharge of his duties, from which authority to waive a forfeiture could be inferred. Nor does it appear that the defendant company, or its local agent, held him out to the public as possessing such power.

The court's first instruction was correct. The second was not supported by the evidence.

Reversed and remanded.

MORTGAGES—PAYMENT OF—EFFECT.—The payment of money due upon a mortgage by one who is not an intermeddler or volunteer, operates as a discharge of the mortgage: *Heisler v. Aultman*, 56 Minn. 454; 45 Am. St. Rep. 486. The payment of a mortgage debt extinguishes the debt, and the title vests in the mortgagor or his vendee without release or reconveyance: *Breckenridge v. Ormsby*, 1 J. J. Marsh, 236; 19 Am. Dec. 71; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655, and note; *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197.

INSURANCE — ENCUMBRANCES — CONDITION AGAINST—BREACH OF.—The execution of a chattel mortgage by a partner on the partnership chattels, insured for the benefit of the firm, is such a change in interest in the subject of insurance as will render it

void: *Olney v. German Ins. Co.*, 88 Mich. 94; 26 Am. St. Rep. 281, and note, with the cases collected.

INSURANCE—WAIVER OF FORFEITURE BY AGENTS.—Agents of insurers possessing limited power to solicit insurance, deliver policies, and receive premiums, cannot waive conditions and forfeitures: *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457; 48 Am. St. Rep. 454. See, also, the extended note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 248, and *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 234.

INSURANCE—AGENTS—WAIVER BY PAROL.—An insurance agent authorized to take risks and issue policies has authority to waive by parol a condition in a policy issued by him: *Grubbs v. North Carolina etc. Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62, and notes with cases collected.

HALL v. MELVIN.

[62 ARKANSAS, 489.]

JUDGMENTS—COLLATERAL ATTACK.—If a bill in equity or a complaint shows no cause of action against the defendant with reference to the subject matter of the suit and tenders no issue, but, on the contrary, shows that there never could be any issue between parties as to such subject matter, a decree based thereon is a nullity and may be attacked, either directly or collaterally.

JUDGMENTS—COLLATERAL ATTACK.—A decree in favor of the grantee of the widow of an intestate, quieting his title to land of the latter, rendered upon a warning order against unknown heirs, is void, either on direct or collateral attack, when the bill, upon which the decree is based, does not show that the title of such heirs has been divested.

J. B. Jones and T. J. Oliphint, for the appellant.

Ratliffe & Fletcher, for the appellees.

442 WOOD, J. The decree was correct. The Pulaski chancery court had no power 443 to confirm and quiet the title in J. J. Bourke to the lands in suit between himself and the unknown heirs of Valentine Melvin, for the all-sufficient reason that Bourke shows affirmatively in his bill, not only that he had no title to quiet, but that the title was in the parties sued. Section 2476 of Sandels and Hill's Digest provides: "If there be no children, or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate." Under this section, Rebecca A. Melvin, as the widow of Melvin, could only have become the owner in fee, provided there had been no heirs of Melvin in existence, known or unknown. Bourke, as her grantee, only acquired such title as she had. So, as strange and paradoxical as it may seem, we have here the anomalous spectacle of one asking that a title be confirmed and quieted in him, which he shows to be in another. "Plaintiff says he believes there

are unknown heirs of Valentine Melvin, nonresidents of this state," is the language of the bill, and he prays for and obtains a warning order against them. And then, without alleging a single fact that would work a divestiture of their title, he asks that it be confirmed and quieted in him. It should require no argument or citation of authority to show that a decree in favor of the complainant, based on such a complaint, is a sort of juridical monstrosity. The learned chancellor who rendered it in the first instance did so doubtless through inadvertence. He was evidently misled; and it was but to be expected that he should promptly annul what had been done, as he did, when he discovered the real status of the case upon which he had passed.

The decree was void, and will be so treated, whether attacked by direct or in a collateral proceeding. Where a bill shows no cause of action against the defendant with reference to the subject matter of the suit, tenders ⁴⁴⁴ no issue with them, but, on the contrary, shows that there never could be any issue with them, the complaint not even being susceptible of amendment to show an issue, a decree based upon such a bill is a nullity, no matter how attacked: *Windsor v. McVeigh*, 93 U. S. 274; *Munday v. Vail*, 34 N. J. L. 418; *Newman's Pleading and Practice*, 688; *Stewart v. Anderson*, 70 Tex. 588; *McMinn v. Whelan*, 27 Cal. 300; *Spoors v. Coen*, 44 Ohio St. 503; *Seamster v. Blackstock*, 83 Va. 222; 5 Am. St. Rep. 262; *Works on Jurisdiction*, 42; 1 *Black on Judgments*, sec. 242.

Counsel for appellant have concluded that "if the complaint had nothing in it whatever from which it might be gathered that it was a proceeding to quiet title, the decree might be said to be invalid, for the reason that there would be pending no cause upon which the court acted." Such is the case here. Merely a prayer to quiet title is not enough. This is not like the case of *Williams v. Renwick*, 52 Ark. 160; 20 Am. St. Rep. 158. It is not merely a failure to state a cause of action, but an affirmative showing of no cause of action.

The court has jurisdiction of the subject matter of quieting titles, but here there is no colorable presentation of the facts necessary to bring this case within that class of cases: *Railway Co. v. State*, 55 Ark. 200.

As authority for bringing this action, counsel for appellants invoke section 5681 of *Sandels and Hill's Digest*, which is as follows: "Where, in an action against the heirs of a deceased person as unknown heirs, or against other persons made defendants as unknown owners of any property to be divided or disposed of in the action, it appears by the complaint that the names of such

heirs, or any of them, of such other persons are unknown to the plaintiff, a warning order, as directed in the last section, shall be made by the clerk against such unknown heirs or owners." This section has no application to the case at hand; for, if there be heirs, the court, as above shown, would ⁴⁴⁵ have no power to grant the relief sought, the title in such case necessarily being in them. Whereas, if there be no heirs, no service could be had, for there would be no one to serve, and the court would be without jurisdiction. Besides, if there were no heirs, there would be no cloud upon the title to remove, and no suit could be brought or would be necessary for that purpose. No authority can be found for bringing such a suit as was brought in the case of *Bourke v. Unknown Heirs*.

Other questions are presented, but it is unnecessary to discuss them.

Affirmed.

JUDGMENTS—COLLATERAL ATTACK.—A void judgment may be attacked in a collateral suit or proceeding: *Chicago etc. Ry. Co. v. Summers*, 113 Ind. 10; 3 Am. St. Rep. 616, and note. A judgment may be impeached on the ground that it never should have been rendered, where it is but prima facie evidence of the defendant's liability: *Williams v. Preston*, 3 J. J. Marsh, 600; 20 Am. Dec. 179. A party whose right is collaterally affected by a judgment which is erroneous, and void for any cause, but which he cannot bring error to reverse may, without reversal, prove it so erroneous or void in any suit in which its validity is drawn in question: *Vose v. Morton*, 4 Cush. 27; 50 Am. Dec. 750. See, on this subject, the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 106, and the note to *Gould v. Sternburg*, 15 Am. St. Rep. 143.

WILSON v. STATE.

[62 ARKANSAS, 497.]

VENUE—PROOF OF.—It is sufficient in a criminal prosecution for the state to prove the venue by a preponderance of the evidence. Proof beyond a reasonable doubt is not required.

Conviction for assault and battery. The accused excepted and appealed from the refusal of the trial court to give the instruction mentioned in the opinion.

Wilson, pro se, for the appellant.

E. B. Kinsworthy, attorney general, for the state.

⁴⁹⁸ **HUGHES, J.** Was there error in the court's refusal to instruct the jury that, unless the venue was proved beyond a reasonable doubt, the defendant could not be convicted? Upon this question there is diversity of judicial opinion, and it may be

that a majority in number of the rulings are that the venue must be proved beyond a reasonable doubt. Bishop, in the first volume of his *New Criminal Procedure*, section 384, subdivision 2, says: "As in other issues, the ⁴⁹⁹ proof is not required to be delivered in the words of the indictment. Any ordinary evidence suffices which in fact leads the jury to the conclusion, beyond, it is perhaps commonly assumed, a reasonable doubt. But we have some authority for saying that the doctrine of reasonable doubt does not extend to this issue, being only jurisdictional": Citing *Cox v. State*, 28 Tex. App. 92; *Achterberg v. State*, 8 Tex. App. 463; *Hoffman v. State*, 12 Tex. App. 406, 407. To which we add *Richardson v. Commonwealth*, 80 Va. 124; *Andrews v. State*, 21 Fla. 598; *State v. Dent*, 6 S. C. 383. We believe that this is the more reasonable view of this question, as the question of venue is a question affecting only the jurisdiction of the court, and does not, in fact, affect the question of the defendant's guilt.

The venue must be proved, but the question is, whether it must be proved beyond a reasonable doubt, or by a preponderance of the evidence only. As Bishop says, it is often, and perhaps generally, assumed that it must be proved beyond a reasonable doubt, but we see no reason in this assumption. To hold that it may be proved by a preponderance of the evidence, and that the doctrine of reasonable doubt has no application where the quantum of proof required to show the venue in a criminal case is involved, deprives the defendant of no right, for it is only his guilt that is required to be proved beyond a reasonable doubt. We are of the opinion that it is sufficient in a criminal prosecution to prove the venue by a preponderance of evidence only. There was no error in the court's refusal to give the instruction No. 2 asked by the defendant.

The judgment is affirmed.

CRIMINAL LAW—VENUE—PROOF OF.—The doctrine of reasonable doubt does not apply to the venue of the offense. That fact is sufficiently established by evidence from which it may be reasonably inferred: *Achterberg v. State*, 8 Tex. App. 463; *Hoffman v. State*, 12 Tex. App. 406; *State v. Burns*, 48 Mo. 438; *People v. Manning*, 48 Cal. 335. It is not necessary that the venire be directly proved, if the right venue is clearly inferable from the entire testimony: *Croy v. State*, 32 Ind. 384. The venue of a crime must be established clearly and beyond all reasonable doubt: *Gosha v. State*, 56 Ga. 36.

Britt, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

CORPORATIONS—LIEN UPON STOCK.—At common law, no lien exists in favor of a corporation upon the stock of any shareholder to satisfy or secure a debt due by him to the company; and unless such lien is created by statute, by charter, or by usage brought to the knowledge of, and acted upon by both parties, it does not exist at all: *Gemmell v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412, and note. See, also, the extended note to *Morgan v. Bank*, 11 Am. St. Rep. 581.

CORPORATIONS—CERTIFICATES OF STOCK—NEGOTIABILITY OF.—Certificates of stock are merely evidence of the ownership of shares, and are not negotiable: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and note. A certificate of corporate shares of stock in ordinary form is not negotiable paper, notwithstanding a custom or usage among stockbrokers to the contrary: *East Birmingham Land Co. v. Dennis*, 85 Ala. 565; 7 Am. St. Rep. 73, and note. See, also, the note to *Knox v. Eden Musee etc. Co.*, 51 Am. St. Rep. 711.

CORPORATIONS—CONVERSION OF SHARES BY REFUSAL TO TRANSFER.—Where plaintiff purchased shares of the stock of a corporation from a stockholder therein in compliance with law and the rules of the corporation, and regularly demanded a transfer of the certificates to him, which the treasurer refused to make upon an untenable ground, the company is liable to an action for the conversion of the shares: *Bond v. Mount Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49.

DICKEY v. GIBSON.

[113 CALIFORNIA, 26.]

HOMESTEADS—MORTGAGE BY SURVIVING SPOUSE AFTER SECOND MARRIAGE.—A homestead selected by a husband from his separate property or from the community property vests absolutely in him upon the death of his then wife, and his title thereto is not affected by his remarriage. He has the power to mortgage such homestead without the knowledge, consent, or signature of his second wife, free from any claim by her.

MORTGAGES—FORECLOSURE—AMENDMENT OF MISTAKE APPARENT FROM THE RECORD.—In an action to foreclose a mortgage, clerical mistakes in the findings as to the amount due, and in the decree as to the description of the property, apparent from the face of the record, may be corrected by the court on its own motion with or without notice.

C. W. Eastin, for the appellant.

L. J. Maddux, for the respondent.

28 SEARLS, C. This is an action to foreclose a mortgage. Plaintiff had judgment of foreclosure, and Crecencia Gibson, as executrix, appeals.

The contention of the appellant is, that a portion of the mortgaged premises were, and are, the homestead of said appellant and of Samuel Gibson, her testator, and that, as to such homestead, the mortgage of the plaintiff and respondent herein never was, and is not now, a lien thereon.

The following facts will serve to illustrate the contention:

In April, 1875, Samuel Gibson was the owner of all the land described in the mortgage herein, and resided thereon with his then wife, Guadalupe Gibson, and their two minor children. The land was the separate **29** property of said Samuel Gibson, acquired by him before marriage.

On the sixteenth day of April, 1875, and while so residing thereon, the said Gibson, and his said wife made, executed, acknowledged, and filed for record, in due form, in the county of Stanislaus, where said land is situate, their declaration of homestead upon all of said land, the value of which was, and is, less than \$5,000. Subsequently, and during the life of said wife, said Samuel Gibson and Guadalupe Gibson, his wife, sold and conveyed a portion of said homestead. In 1879 the said wife, Guadalupe Gibson, died.

On or about February 18, 1882, Samuel Gibson intermarried with Crecencia Gibson, the appellant herein, and they have since resided upon the premises in question with the two minor children of the first marriage, and with six minor children, the fruit of the second marriage. Subsequent to the second marriage (probably) Samuel Gibson repurchased the land so sold by him and his first wife, Guadalupe.

On the second day of December, 1889, the plaintiff and respondent herein loaned to said Samuel Gibson \$5,700, and the latter made to said plaintiff his promissory note therefor, payable one year after date, with interest at eight and one-half per cent per annum, compounded annually, etc., and, to secure the payment of said promissory note, said Gibson executed his mortgage to plaintiff on all the land referred to herein, including that sold and reconveyed to said Gibson, as well as the homestead premises. The mortgage was recorded.

On the twenty-eighth day of May, 1894, at the county of Stanislaus, state of California, said Samuel Gibson departed this life, leaving a last will under which Crecencia Gibson was nominated as executrix, and such proceedings were thereafter had that the said last will was duly admitted to probate, and said Crecencia

Gibson duly appointed executrix thereof, and she duly qualified as such executrix, and still is acting as such. ³⁰ Crecencia Gibson, the appellant here, did not execute the mortgage or receive any portion of the consideration of the note which it was given to secure.

Respondent presented his claim to the executrix for allowance, and then brought this action to foreclose, waiving, in his complaint, all recourse against any other property of the estate, except the mortgaged premises.

By the decree, the court ordered a sale of the property, other than the alleged homestead, to be first made, and then the homestead premises, if necessary to satisfy the demand of plaintiff.

Section 1265 of the Civil Code, as amended in 1880, provides as follows in reference to homesteads: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title [Civ. Code, div. 2, pt. 4, title 5]; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title."

As will be observed from the foregoing section, upon the death of either spouse, a homestead declared upon community property vests absolutely in the survivor.

In the hands of such survivor it is protected against enforced sale, precisely as before it had been protected to the community by its homestead character: *Sanders v. Russell*, 86 Cal. 119; 21 Am. St. Rep. 26; *Estate of Burdick*, 76 Cal. 639; *Sheehy v. Miles*, 93 Cal. 288; *Tyrrell v. Baldwin*, 78 Cal. 470.

Prior to the amendment of 1880, and under the law of 1862, the homestead, in such cases, went to the survivor, subject to forced sale for debts accruing after the ³¹ death of the other spouse: *Watson v. His Creditors*, 58 Cal. 556.

When, as in this case, the homestead is selected from the separate property of the husband, who joined in its selection as a homestead, then, upon the death of the wife, it goes absolutely to the surviving husband: *Estate of Croghan*, 92 Cal. 370; *Code Civ. Proc.*, sec. 1474.

The title to the homestead property, then, vested absolutely in Samuel Gibson at the death of his first wife, Guadalupe Gib-

son, in 1879, which was some ten years prior to the making of the note and execution of the mortgage herein. Could he then execute a valid mortgage on the homestead premises? We think this question must be answered in the affirmative.

By the death of the first wife the homestead property vested absolutely in the surviving husband, Samuel Gibson. As far as the legal title is concerned, it vested in him as fully and perfectly as though no homestead had ever been carved out of it. The limitations and immunities which accompanied the enjoyment of the property under such title, modified, not the title, but its enjoyment, and were only such as the statute imposed. Save as to these limitations and immunities, the homestead ceased to exist.

It was also, under section 1474, exempt from the payment of any debt or liability contracted by or existing against either the husband or wife, or either of them, previous to or at the death of such husband or wife, except as provided in the Civil Code: Code Civ. Proc., sec. 1474.

The Civil Code provides the manner by which the homestead may be sold, abandoned, or encumbered: Civ. Code, secs. 1240-1244.

The legislature evidently contemplated that cases would arise in which third persons would succeed by purchase to the rights and title of successors to homesteads, for it is provided by section 1435 of the Code of Civil Procedure, that such purchasers "shall have all ³² the rights and benefits conferred by law on the persons whose interests and rights they acquire."

Herrold v. Reen, 58 Cal. 443, was a case in which a homestead was declared by husband and wife upon community property under the act of 1860.

In 1862 the statute was so amended that it provided, as at present, that upon the death of the husband or wife the property, as at present, vested in the survivor. The husband died subsequently to this amendment.

Under the act of 1862, as at present, in order to constitute a valid mortgage on the homestead, it was necessary for the spouses to co-operate.

After the death of the husband, the wife executed a mortgage upon the homestead property, and it was held valid and binding, although the mortgaged premises had been set apart by the probate court as a homestead for the mortgagor and her children.

When the Civil Code, section 1242, provided that the homestead of a married person could only be conveyed or encumbered by the execution and acknowledgment of an instrument by both

husband and wife, it was dealing with the condition which it had established by the same title, in reference to homesteads, and for the protection of the spouses in their status as husband and wife, and with no view to the altered conditions existing after the death of one of the spouses, when there was no marital relation to protect, and when, by the same law, it was provided that the title to the homestead property, which, during coverture, was held jointly, should vest in the survivor.

It would require a more emphatic declaration than is to be found in our statute to authorize a construction which would forever deny to the homestead survivor the right of alienation of property the title to which is vested in him "absolutely."

We must not be understood as holding that in the hands of Samuel Gibson the former homestead was liable to sale on a money judgment against the latter. That question was determined in *Tyrrell v. Baldwin*, 78 Cal. 470, ³³ against such contention. That case did not hold, however, that the survivor could not mortgage the property, but indicated, without deciding, that he could do so. The following language was used: "It does not follow that because the survivor can mortgage the property after the title vests in him, it is subject to sale under execution; or that because the title vests absolutely in the survivor the homestead is subject to forced sale. Such title is entirely consistent with the law of exemptions": Citing *Estate of Headen*, 52 Cal. 294.

Waples, in discussing this question, says: "By the provision, 'The homestead property selected by the husband and wife, or either of them, . . . shall, upon the death of the husband or wife, vest absolutely in the survivor,' after the demise of either, the power to mortgage is in the widow or widower, as the case may be": Waples on Homestead, 601.

The title to the homestead property, having vested in Gibson at the death of his first wife, was not affected by his second marriage to the appellant herein.

As was said in *Graham v. Stewart*, 68 Cal. 379: "The marriage changed her social status, but did not change her right to the property. In its title and use it remained vested in her as the true owner, usable by her for her exclusive benefit, and disposable by her, without the consent of her husband, in the manner provided by law; i. e., by a conveyance of the property," etc.

The facts of that case are on all fours with this, except that there the husband had died and the widow had again married, and thereafter executed a mortgage on the former homestead,

while here it was the husband who survived and executed the mortgage.

We are of opinion that, upon both principle and authority, the mortgage executed by Samuel Gibson to the respondent was valid, and created a lien upon the property in question.

The portions of the complaint which appellant moved to strike out were proper as a predicate for the injunction which plaintiff sought, and as a foundation for the ³⁴ appointment of a receiver. The temporary injunction was dissolved, and no receiver was ever, so far as appears, appointed.

The following mistakes occurred in the proceedings, and were amended by the court without notice to appellant, and these amendments are urged as error:

1. The court found there was due to plaintiff, as principal upon the note in suit, \$5,700, and as interest, \$1,957.21, as a counsel fee \$200, and costs \$20.25, aggregating \$7,877.46.

As conclusions of law from the foregoing findings of fact, the court found that there was due plaintiff, on the promissory note in the findings set out, the principal sum of \$570, thus omitting a cipher to make it \$5,700 as in the facts. The conclusion as to interest, counsel fee, and costs, together with the aggregate of \$7,877.46, for which judgment was ordered, was precisely as in the finding of facts.

This was, as abundantly appeared by the record, a mere clerical misprision, which the court could, on its own motion, amend with or without notice.

2. In entering the decree, by inadvertence and mistake the fractional southeast quarter of the southwest quarter of section 36, township 2 south, range 7 east, Mount Diablo base and meridian, was omitted, although contained in the mortgage and findings. The court amended the decree one month after its entry by including therein this fraction. What we have said of the former amendment applies to this also: *Bostwick v. McEvoy*, 62 Cal. 496; *Beatty v. Dixon*, 56 Cal. 624; *Fallon v. Brittan*, 84 Cal. 514; *Egan v. Egan*, 90 Cal. 21; 1 *Freeman on Judgments*, 4th ed., sec. 72 a.

We recommend that the judgment be affirmed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed.

Temple, J., Henshaw, J., McFarland, J.

Hearing in Bank denied.

HOMESTEAD.—EFFECT OF THE DEATH OF HUSBAND OR WIFE is discussed in the note to *Sanders v. Russell*, 21 Am. St. Rep. 29, 30. A widow does not lose her right of homestead in the estate of the first husband by a second marriage: *Miles v. Miles*, 46 N. H. 261; 88 Am. Dec. 208, and note. Upon the death of the husband, the wife may continue to occupy the whole of the homestead until otherwise disposed of according to law, and the fact that she marries again does not render the homestead liable to partition at the suit of the deceased husband's heirs: *Nicholas v. Purczell*, 21 Iowa, 265; 89 Am. Dec. 572, and note.

MORTGAGES—CORRECTION OF DESCRIPTION IN.—A mortgagee who takes a mortgage intended to be upon the south half of a quarter section of land owned by the debtor, but which is, by mistake, described as the north half of such quarter section, is entitled, as against the mortgagor, to have the mortgage reformed and foreclosed against the land intended to be described, but not as against a subsequent bona fide purchaser without notice of the mistake: *Snyder v. Partridge*, 138 Ill. 173; 32 Am. St. Rep. 130, and note.

WARNER v. SOUTHERN PACIFIC COMPANY.

[113 CALIFORNIA, 105]

TRIAL—VERDICT—SUFFICIENCY OF EVIDENCE.—If there is sufficient conflict in the evidence to put the determination of the issue within the province of the jury, the verdict cannot be disturbed on appeal on the ground of the insufficiency of the evidence to sustain it.

INSTRUCTIONS—ERRONEOUS, AS GROUND FOR SETTING ASIDE VERDICT.—An excessive verdict based on erroneous instructions that the case is one in which punitive or vindictive damages may be awarded must be set aside on appeal.

DAMAGES, EXEMPLARY, AGAINST MASTER.—A master is liable only for actual or compensatory damages caused by an act of his servant done in the execution of authority given by the master, but performed in a reckless, wanton, and unlawful manner, not participated in, authorized, nor ratified by the master. In such case, the master is not liable for vindictive damages or smart money.

RAILROADS—LIABILITY IN DAMAGES FOR ACTS OF CONDUCTOR.—A railroad corporation, though liable in actual damages, cannot be charged with punitive, or vindictive damages for the illegal, wanton, and oppressive conduct of a conductor on one of its trains toward a passenger, unless it either authorizes or ratifies such conduct.

DAMAGES—MEASURE OF AGAINST PRINCIPAL.—A principal, whether a corporation or a private person, though liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent.

CORPORATIONS—LIABILITY IN DAMAGES FOR ACTS OF SERVANTS.—Railroad companies and other corporations are not liable in punitive damages for the wanton or oppressive acts of their agents or servants, not participated in nor ratified by the corporation.

J. B. Campbell, R. B. Terry, and W. F. Herrin, for the appellant.

F. H. Short and M. Walser, for the respondent.

107 McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a new trial.

The material averments of the complaint are, that while plaintiff was traveling on a railroad train of defendant from Fresno to Fowler, and after he had given to the conductor a proper ticket, the latter demanded of plaintiff a second fare, and applied to him abusive epithets, and forcibly ejected him from the car in which he was riding onto the platform, and, with other employes of defendant, assaulted and beat him, and threatened to throw him from the moving train, to his damage in the sum of twenty-five thousand dollars, and that by reason thereof he was unable to attend to business for six days, and was compelled to employ a physician, to whom he incurred for medical services a bill of five dollars, and that his loss of time was of the value of ten dollars. All these averments are denied in the answer; and it is also therein averred that plaintiff was intoxicated, boisterous, profane, etc., in the presence of the other passengers, including women and children, and made of himself an absolute nuisance, and that defendant's employes used no more force than was necessary to keep him quiet and protect themselves and the other passengers.

108 The evidence was conflicting as to some of the main facts. After the train started from Fresno toward Fowler, the plaintiff and some companions, among whom were three men named Griffin, Gray, and Metcalf, were collected around and near the stove in the rear end of the car. The evidence shows beyond a doubt that some of this party were boisterous and more or less intoxicated, and used loud, profane, and obscene language, to the great annoyance of the passengers, some of whom were ladies. Whether or not plaintiff personally was guilty of such conduct is a matter about which the witnesses differed. The plaintiff and Gray testified that plaintiff did not use any bad language prior to a certain personal conflict with the conductor, to be noticed hereafter, but plaintiff admitted that he did use such language after said conflict; while other witnesses, particularly Thompson, Patterson, Willow, and Waggener, testified that he used such language all the time, and kept it up until the train reached Fowler, and drew and flourished a knife.

As to the personal conflict above referred to, there is a very de-

cided conflict of evidence. The plaintiff's testimony was in substance this: He was sitting on the coalbox with some other persons, including Griffin, Gray, and Metcalf, near him, when Gordon, the conductor, came through the car taking up tickets. Griffin had no ticket, but gave the conductor a dollar which he put in his pocket. Plaintiff then gave the conductor his ticket, which the former accepted, punched, and put in his pocket, and was about to go out of the door when Griffin asked him for his change. The conductor told Griffin to "keep his shirt on," and went out, but returned "in a minute or two," and gave him his change. He then turned to plaintiff and said, "you have not paid your fare." Plaintiff, according to his statement, said, "I beg your pardon, I have"; whereupon the conductor immediately called him a G—d d—d liar, and said that he would throw him off if he didn't pay. Plaintiff said: "I don't wish to be thrown off; if that ¹⁰⁰ ain't satisfactory, I am willing to pay you a second time." But the conductor, without waiting to be paid the second time, caught him by the shoulder, and plaintiff, slipping, was drawn by the conductor through the door onto the platform, and there held down and beaten. Such are the main features of plaintiff's testimony; and as to the most important facts stated by him he was corroborated by Gray and Griffin, and to some extent by the witness Treece.

The testimony of the conductor as to this personal conflict was radically different from that of plaintiff, and was substantially this: When he reached the end of the car, he took tickets from plaintiff and two other men near the stove, Griffin giving him a ticket and not money, and was about to go out of the door when an employé of the defendant who was traveling on the car told him that he had missed a man behind the stove; and, turning back, he discovered Metcalf and asked him for a ticket, and Metcalf said that he had given him one. The conductor told him that he had not, and he replied that he would not pay any more, whereupon the conductor informed him that he must pay or get off, and reached over and took hold of Metcalf and raised him up. At that moment Griffin grabbed the conductor by the shoulders and either Griffin or plaintiff said that no d—d conductor could put his friend off the train. The conductor then let go of Metcalf, and a personal conflict occurred between the conductor and Griffin, which ended in both landing on the platform, Griffin being down and the conductor on top of him; and the former crying to be let up, the conductor did so, and went back into the car where he then collected Metcalf's fare without

further trouble. He then went out of that car and did not return to it until after Fowler, where plaintiff got off, had been passed. According to his testimony he never struck plaintiff, or laid hands on him, or touched him, or had any personal conflict with him whatever. In this testimony he was fully corroborated by Willetts, who was a brakeman, following ¹¹⁰ the conductor through the car; by Powers, who was also a brakeman, and was present and witnessed the occurrence; and by the witnesses Willow and Thompson, who had no business relation with the defendant, but happened to be passengers on the car when the difficulty occurred. All of these witnesses testified positively that there was personal collision between the conductor and plaintiff, and that it was entirely between the former and Griffin. Upon the cross-examination of Griffin, he admitted that he had verified a complaint in an action brought by himself against the defendant for damages sustained on this same occasion; which action was afterward dismissed.

Counsel for appellant strongly argue that the evidence—the outlines and substance of which are above given—is insufficient to sustain the finding of the jury that the conductor ever touched the plaintiff or injured him in any manner whatever. They argue that the story of plaintiff is so improbable and unnatural, that whatever reason there might be for believing it, if it stood alone, is entirely swept away by the testimony of the witnesses for defendant. And it is, indeed, somewhat difficult to believe that a conductor having any regard for his own interest and safety would refuse to receive an offer to pay fare by a passenger, and immediately commence an unprovoked attack upon him under the circumstances testified to in this case by plaintiff. However, we are not prepared to say that the evidence in favor of plaintiff was so slight as to warrant us in denying the power of the jury to base their verdict upon it. There was a sufficient conflict to put the determination of the issue within their province.

But the amount of damages allowed was grossly beyond all reasonable limit. There is no pretense that plaintiff suffered any serious injury. He complained of a bruised leg, but the testimony of his physician shows only trifling injury. In his complaint he claims only ten dollars for loss of time, and five dollars for his doctor's bill. Under the circumstances shown by the ¹¹¹ evidence, he certainly was not entitled to much for humiliation or injury to his dignity. Under any view, as favorable to plaintiff as could be justly taken, the damages award-

ed should not have exceeded at the utmost limit a few hundred dollars. Yet the verdict was for five thousand dollars. The excessive verdict was no doubt the result, to a great extent, of the erroneous instructions of the court, given in various forms, that the case was one in which punitive or vindictive damages might be awarded against the defendant. It is not to be supposed that the jury really thought that plaintiff had suffered actual damage to the extent awarded by the verdict. Indeed, counsel for plaintiff say that the verdict rests mainly upon "the gross and malicious conduct of the defendant toward" the plaintiff. And yet it is quite clear that "the defendant"—the employer of the conductor—was not guilty of any "gross and malicious conduct."

It was a question formerly whether an employer could, under any circumstances, be held liable for even compensatory damages caused by the wanton and malicious acts of his employé. In the recent case of *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 562, 27 Am. St. Rep. 223, it was held that the defendant was not liable for damages caused by the wanton and mischievous backing of a locomotive by an engineer with intent to frighten passengers on an approaching street-car. Perhaps the rule now is, and we will assume it to be so for the purposes of this case, that the master is liable for actual damage caused by an act of the servant done in the execution of authority given by the master, although it was caused "by a wanton and reckless purpose to accomplish the master's business in an unlawful manner"; but it is not the law that in such a case the master is liable for more than will compensate the injured person for the damages which he has sustained. The master is not liable in such a case for vindictive damages, or "smart money," unless he had either authorized the malicious act of the servant beforehand, ¹¹² or had ratified it afterward. There are some authorities the other way; but the preponderance of adjudicated cases, and the entire force of the reasoning upon the subject, establish the law as above stated. The entire basis of the doctrine of vindictive damages is, that the person, himself, who is sued has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society, and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty. If the driver of a merchant's delivery wagon should wantonly run over another person, it would be hard enough for the master to be held liable for all actual dam-

age caused by the unlawful act of his servant; but to go beyond that and allow a jury, in addition to compensating the injured party for his loss, to inflict further damages as a punishment for something which he did not do, would be to allow a gross outrage not sanctioned by any principle of justice.

The decisions outside of this state establishing the principle above declared are innumerable; but it is unnecessary to refer to them here in detail, because the leading cases on the subject are referred to and cited in the comparatively recent case of *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 110, in which the supreme court of the United States reviewed the whole subject, and held the law to be as hereinbefore declared. In that case the only question before the court was whether a railroad company could be charged with punitive damages for wrongful treatment of a passenger by a conductor; so that the whole attention of the court was directed to that one point. There a conductor had been guilty of grossly oppressive acts toward the plaintiff who was a passenger, because the latter had offered tickets which the conductor deemed insufficient, and had subjected him to great humiliation; and counsel for defendant admitted at the trial that plaintiff "was entitled to recover actual damages." But the trial court ¹¹³ instructed the jury that, "after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal (and it was illegal), wanton, and oppressive"; and for giving this instruction, and for this alone, the judgment was reversed. Counsel for defendant in error in the opening of his brief, said: "But one question arises upon the record, and that is, under the facts, is plaintiff in error liable for punitive damages"; and the court, at the commencement of its opinion, said: "The simple question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains toward a passenger." Therefore, the opinion in that case was an absolute, definite decision of the point, and not a mere statement of dicta about a question not necessarily involved. The opinion delivered by Mr. Justice Gray is quite long and exhaustive. We will make from it only a few quotations to show its general character. The court, among other things, say: "Exemplary or punitive damages, being awarded, not by way of compensation to

the sufferer, but by way of punishment of the offender and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent." Again, the court uses the language employed in *Keene v. Lizardi*, 8 La. 26, 33, as follows: "It is true juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justified in an action against the wrongdoer, and not ¹¹⁴ against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of the factor or agent"; and then cites a large number of cases, including one from California, which are said to be "to the same effect." And again the court say that "the rule has the same application to corporations as to individuals." Again the court say: "The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents." Again the court say: "The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterward chief justice of Rhode Island," in *Hagan v. Providence etc. R. R. Co.*, 3 R. I. 88; 62 Am. Dec. 377; and numerous quotations are made from the opinion of Justice Brayton, of which we take the following: "If, in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed where the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal and make him particeps criminis of his agent's act." A quotation to the same effect is made from the court of appeals of New York; and the court say that "similar decisions, denying upon like grounds the liability of railroad companies and other corporations sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not

participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, ¹¹⁵ and West Virginia." It is clear, therefore, that under the general authorities, including the decision of the highest court in the land, the law is established as heretofore declared.

Turning to our own state, we find that, with the single exception of some expressions in the opinion delivered in one of the departments in *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, the decisions here have been in harmony with and declaratory of the principle above stated. The first cause involving the point is *Wardrobe v. California Stage Co.*, 7 Cal. 119; 68 Am. Dec. 231. In that case, the plaintiff was injured while on a stage coach of defendant driven by defendant's servant, and the trial court instructed the jury that, if the stage was driven recklessly at the time of the disaster, "then they should find, not only the actual damages sustained by the plaintiff, but they should give additional damages such as would be an example thereafter," etc., and the appellate court held such instruction to be erroneous, and for that reason reversed the judgment. In its opinion the court, after alluding to other matters, say: "In the second place, it is shown that the stage at the time of the accident was driven by the servant or agent of the defendant, and the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him." The court refers at length to the early leading case upon the subject in *The Amiable Nancy*, 3 Wheat. 546, in which the opinion was written by Judge Story.

In *Turner v. North Beach etc. R. R. Co.*, 34 Cal. 594, the plaintiff was wrongfully ejected from a car of defendant (a railroad corporation) by a conductor; and the trial court instructed the jury that the injury to plaintiff, if committed by the conductor willfully, etc., "entitled her to what is called exemplary damages," and the court for this reason, although the verdict was for only seven hundred and fifty dollars, reversed the judgment. Mr. Justice Crockett, in delivering the opinion ¹¹⁶ of the court, after a full discussion of the principles involved, said: "Tested by these principles, it is obvious that, in this case, the defendant was not liable for any malicious and wanton conduct of the conductor. If liable at all, its liability must be confined to the actual damage which the plaintiff suffered. To render the defendant liable for punitive damages, it was incum-

bent on the plaintiff to show that the act complained of was done with the authority, either express or implied, of the defendant, or was subsequently adopted by the company: Hagan v. Providence etc. R. R. Co., 3 R. I. 88; 62 Am. Dec. 377." Again he says: "If her expulsion resulted from malice of the conductor, or was accompanied by violence and personal indignity, the conductor is alone responsible for such damages as she may be entitled to for this cause beyond the actual damage resulting from the expulsion from the car, unless, as before stated, the company expressly or tacitly participated in the malice and violent conduct of the conductor. In other words, if the act of the conductor was wholly authorized" (but, of course, done without the general scope of his authority), "the company is liable for the actual damage, and the conductor alone for the punitive damages, if any." No other case can be found in the books which more fully and definitely declares the law to be as we have stated it. This case was referred to and approved in Wade v. Thayer, 40 Cal. 586. In Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657, which was an action for damages alleged to have been done to certain lumber of plaintiff, the trial court charged the jury "that, if the damage to the lumber was wantonly and maliciously caused by the defendant, the jury might give punitive damages"; but the judgment was reversed because there was no evidence that the defendant had done or participated in any wanton and malicious acts—such acts if done at all having been committed by defendant's servants. The court said: "But, whilst there was evidence tending to show that the damage to the lumber was caused by the malicious and wanton acts of the agents and servants of ¹¹⁷ the defendants, I discover nothing in the record tending to prove that the defendant authorized or consented to the malicious conduct of its agents and servants, or approved it afterward; and it is well settled that, though the principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, he is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal. In the case of Turner v. North Beach etc. R. R. Co., 34 Cal. 594, we had occasion carefully to consider this question, and announced the rule to be as above stated; and have reaffirmed it in the case of Wade v. Thayer, 40 Cal. 586. I am, therefore, of opinion that the court erred in giving the fifth instruction requested by the plaintiff, there having been no evidence to

support it. As the judgment must be reversed for this cause, I deem it unnecessary to notice the other errors assigned."

The foregoing cases establish the law in this state in harmony with the current of general authority; and they are not to be taken as overruled by what was said in the opinion in *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157. In this latter case, it was averred in the complaint that the plaintiff was wrongfully and with force expelled and ejected from defendant's train, and damages were prayed for in the sum of ten thousand dollars. The jury returned a verdict for plaintiff in the comparatively small sum of five hundred dollars, and a close examination of the case will show that the only real question before the court was whether this small amount of damages was—independent of any question of punitive damages—so excessive as to warrant the court to set it aside. The trial court did not instruct the jury that they could give punitive damages, and we cannot see how the question of punitive damages was at all involved in the case. All that we know about instructions asked by the defendant and refused is contained in the sentence from the opinion of the commissioner ¹¹⁸ delivered in department: "The instructions refused were asked upon the theory that the plaintiff could in no event recover more than his actual damages, and that such damages could not exceed the cost of a ticket from the point where he was expelled to the point of his destination, together with a reasonable allowance for the loss of time." Of course, these instructions were erroneous, because they involve the proposition that damages must be confined to the price of a ticket and loss of time—leaving out entirely injury to the feelings, humiliation, disgrace, etc. The question of punitive damages was not, therefore, necessarily involved. The whole case was decided in these words of the opinion: "We see nothing in this case to indicate that the jury acted under the influence of passion or prejudice, and, in our opinion, the verdict cannot be disturbed on the ground that the damages were excessive"; and what is said about vindictive damages is dictum. That the department did not intend to overrule or disturb the former decisions of this court upon the subject of punitive damages is apparent from the fact that no allusion was made to them.

There are some other minor questions in the case, but they are not likely to arise upon another trial, and we do not deem it necessary to extend this opinion by discussing them. The judgment must be reversed, because the damages found by the jury were excessive, and because the trial court erroneously instructed

the jury that the case was a proper one for punitive damages against the defendant.

The judgment and order denying a new trial are reversed and the cause remanded.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

RAILROADS—ASSAULT BY CONDUCTOR—DAMAGES.—An assault by a railroad conductor upon a passenger, though provoked by profane and abusive language, is not justified thereby and renders the railroad company liable in exemplary damages: *Baltimore etc. R. R. Co. v. Barger*, 80 Md. 23; 45 Am. St. Rep. 319, and note.

MASTER AND SERVANT—DAMAGES FOR UNAUTHORIZED ACT OF SERVANT.—A master is not liable in exemplary or punitive damages for the tort of his servant, unless he authorized it, or with knowledge of the wrong and its nature adopted or ratified it so as to make it his act in fact: *Gulf etc. Ry. Co. v. Reed*, 80 Tex. 362; 26 Am. St. Rep. 749; *Hogan v. Providence etc. R. R. Co.*, 3 R. I. 88; 62 Am. Dec. 377, and extended note. This subject is fully discussed in the extended note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 876, 877.

APPEAL—CONFLICTING TESTIMONY.—If the testimony of witnesses is conflicting, it will not be considered on appeal: *Olfermann v. Union Depot R. R. Co.*, 125 Mo. 408; 46 Am. St. Rep. 483, and note. Where the evidence is conflicting, the judgment will not be disturbed on appeal: Note to *Alabama etc. Ry. Co. v. Bolding*, 30 Am. St. Rep. 545. A judgment will not be reversed on appeal because there is an apparent preponderance of evidence against it. Disputed questions of fact will not be retried: *Kansas City etc. R. R. Co. v. Berry*, 53 Kan. 112; 42 Am. St. Rep. 278, and note; but on this point see *Sullivan v. Susong*, 36 S. C. 287; 31 Am. St. Rep. 865, and note.

WIGGINS v. MUSCUIABE LAND & WATER COMPANY.

[113 CALIFORNIA, 182.]

WATER AND WATERCOURSES—APPORTIONMENT OF FLOW BY PERIODS OF TIME.—A court of equity has power to apportion the flow of water in a stream to the respective riparian owners by periods of time, rather than by a division of its quantity, so that each may have the full flow of the stream during such designated period, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner would better conserve the rights of all the riparian owners. This is especially so when the stream, instead of increasing as it goes toward the sea, constantly diminishes until it finally disappears.

WATER AND WATERCOURSES—APPORTIONMENT OF FLOW BY PERIODS OF TIME FOR DOMESTIC USE.—The same principles which authorize an apportionment of the flow of a stream by periods of time for purposes of irrigation, justify such apportionment for domestic uses.

WATER AND WATERCOURSES—USE OF WATER.—The use to which different proprietors may apply the water of a steam

which flows through their land is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied, but it is a right annexed to the land and a part thereof, and is an inherent element of the property which he has in the land itself. This right in each proprietor is, however, relative to the rights of the other riparian proprietors, and is to be exercised with proper regard to those rights.

WATER AND WATERCOURSES—APPORTIONMENT OF FLOW BY PERIODS OF TIME—PRESUMPTION ON APPEAL.—When the trial court has found that a division of the flow of a stream between riparian proprietors by specific periods of time is reasonable and equitable under all of the facts of the case, and the evidence is not presented to the appellate court, the latter must presume that the findings were sustained by the evidence and the court duly considered all the evidence before it, as well as all uses for which the water was available, both for domestic and irrigation purposes.

WATER AND WATERCOURSES—APPORTIONMENT OF FLOW FOR DOMESTIC PURPOSES.—It cannot be said, as matter of law, that the inferior riparian proprietor has a necessity for a continuous flow of a stream for domestic purposes, any more than for purposes of irrigation. In either case he is entitled to only a reasonable use, depending upon all the circumstances in the case. If neither of the proprietors has any use for the water, other than for domestic purposes, the length of the periods of time during which each is entitled to the flow of the stream, as well as the frequency of their recurrence, must be fixed different from what they would be if the waters were used for irrigation alone. Whenever it appears that the only method by which either proprietor can have a reasonable use of the stream is by allowing to each its full flow for a reasonable time, the only equitable adjustment of their rights is to thus apportion the flow.

WATER AND WATERCOURSES—APPORTIONMENT OF FLOW FOR IRRIGATION.—The right of a riparian owner to the use of the water of a stream is not measured by the amount of water which he actually uses, nor is it to be assumed that the same amount of land will be cultivated in each succeeding year, in apportioning the water between riparian proprietors. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation is properly made a controlling element in adjusting their respective rights to the flow of the stream.

WATERS AND WATERCOURSES—LOSS BY ABSORPTION—ARTIFICIAL DELIVERY TO LOWER OWNER.—If a large amount of water is naturally lost by absorption and evaporation in passing through its natural channel from the lands of an upper riparian owner to those of the lower owner, the upper owner may provide artificial means for carrying all the water of the stream in excess of the amount so lost to the lands of the lower owner, and he may retain for his own use so much of the water thus otherwise lost as he can save by artificial means.

Waters and Shoup, for the appellant.

W. P. Gardiner, for the respondent.

185 HARRISON, J. The plaintiff is the owner of a rectangular tract of land, having an area of one thousand acres, lying to the south and west of a larger tract belonging to the defend-

ant, Muscupiabe Land and Water Company, and through both of these tracts of land there flows a stream of water known by the name of Devil Canyon Creek. This stream has its source in the mountains north of the defendant's tract, and flows through the canyon in a southerly direction, and thence southerly and southeasterly through the defendant's tract of land to the north line of the plaintiff's tract, which it crosses in a southeasterly direction and again enters the defendant's tract. The length of its course through the defendant's land before it reaches the plaintiff's land is fifteen thousand five hundred and seventy feet, and its course southeasterly across the plaintiff's land is three thousand two hundred feet in length, when it again enters the land of the defendant, through which it flows for thirteen thousand four hundred and fifty feet. Of the lands of the plaintiff only the northerly two hundred and forty-five acres are within the watershed of this stream and riparian thereto. With irrigation this land can be made productive, but without irrigation it is ¹⁸⁶ dry and practically useless. The land of the defendant, which lies to the north of the plaintiff's land, adjacent to and bordering upon the stream, is rough, rocky, sandy, and worthless; and for the first four thousand feet south of the place where the stream enters this land is not susceptible of cultivation. Below this point, and at a short distance to the eastward of the stream, a portion of the defendant's land—about twelve hundred acres in extent, lying north of a prolongation of the north line of the plaintiff's tract—is within the watershed of the stream, and, if irrigated from the stream, may be made productive. In July, 1891, the defendant diverted upon this land all the waters of the stream above the plaintiff's tract, and thereupon the plaintiff commenced the present action for the damages sustained thereby, and to enjoin the defendant from any further interference with the flow of the stream. The cause was tried by the court, which found, in addition to the foregoing facts, the following:

"22. The most valuable use to which the water of said stream can be put is that of irrigation. The portion thereof that would be required for domestic and culinary purposes and for watering stock would not perceptibly diminish the volume of water flowing in the stream when there is sufficient therein to be available for irrigation."

"23. The bed of said stream is sandy and porous, and the air in that locality is, during the irrigating season, dry and hot. The quantity of water usually flowing in the stream varies great-

ly in different years, and in different seasons of the same year, and considerably in different portions of the day, there being more flowing at night than in the daytime. The usual irrigating season lasts from June 1st to October 1st. During the winter season, and when the water is not wanted for irrigation, there is more water flowing therein than is needed or can be used by the riparian owners. After the water enters the lands of the Muscupiabe Land and Water Company a large portion thereof ¹⁸⁷ is lost by evaporation and by absorption before it reaches the one thousand acre tract of said Wiggins. The flow of the stream also greatly diminishes from the end of the rainy season until about August 15th of each year."

"24. In a season of average rainfall, when there is no diversion of the water of said stream, the usual flow of the water therein at the point where it enters the land of said Muscupiabe Land and Water Company, and at the point where it enters the land of Wiggins, computed in miner's inches, measured under a four-inch pressure, is as follows: 'From July 1st to July 15th: At the north line of said company's land, one hundred and fifty inches; at the north line of Wiggins' place, fifty inches. From July 15th to September 10th: At the north line of said company's land, one hundred inches; at the north line of Wiggins' place, none. From September 10th to October 1st: At the north line of said company's land, one hundred and fifty inches; at the north line of Wiggins' place, fifty inches. When there is no more than one hundred inches at the point where said stream enters the land of said company, the same is all taken up by evaporation and absorption, so that none of it reaches the one thousand acre tract of said Wiggins.'"

"25. The said Muscupiabe Land and Water Company has constructed and now maintains a dam across the said stream, and a ditch leading therefrom onto the land of the company aforesaid sufficient in size to carry all the waters of said stream. When, during the irrigating season, the water of said stream is all diverted in said ditch, until the bed thereof below the said dam becomes dry and the water is afterward turned again down and allowed to flow in said stream uninterrupted, it requires two days' flow before any of it will reach the one thousand acre tract of Wiggins, owing to the absorption of water by the creek-bed and the evaporation by the heat and dryness of the air, and the said stream does not attain its full flow at the north line of Wiggins' tract until about five days after it is so returned to said stream."

¹⁸⁸ "26. If the said stream were divided by quantity at the dam of said company, and the proper proportion in quantity which would be due to each of said riparian owners for his reasonable use thereof was allowed to flow in separate streams to each, the amount allowed to said Wiggins would be so small that none of it would ever reach his land."

"27. The amount of water required to irrigate such of the lands of the said company, and of said Wiggins, as is properly susceptible of irrigation, is the equivalent of a constant flow of one miner's inch, measured under a four-inch pressure, to each five acres of said land."

"28. Under all the circumstances and facts in this case, a reasonable and equitable division of said water between the said Muscupiabe Land and Water Company and the said Wiggins would be to allow to the said Wiggins the full flow of the stream, uninterrupted and continuously, for eight days out of each forty days, beginning April 1st of each year, upon said one thousand acre tract, and to allow to the said Muscupiabe Land and Water Company the full flow of the stream during the remaining portion of each period of forty days; provided that, when there are no more than one hundred miner's inches of water, measured under a four-inch pressure, flowing in said stream at the point where it enters the land of the said Muscupiabe Land and Water Company, the said company should be allowed to divert all the water of said stream, and to continue so to divert the same until there are more than one hundred inches aforesaid flowing at said point."

The conclusions of law and the judgment thereon follow substantially the twenty-eighth finding, and by the judgment the plaintiff is enjoined from diverting the water of the stream for use upon any portion of his thousand acre tract, except the northerly two hundred and forty-five acres thereof, and the defendant is enjoined from diverting the waters of the stream for use anywhere, except upon its land lying to the north of a line drawn in prolongation of the north boundary of the ¹⁸⁹ plaintiff's tract. From the judgment thus rendered the plaintiff has appealed, bringing the appeal here upon the judgment-roll alone, without any bill of exceptions, and urges in support of his appeal that the findings of fact are insufficient to sustain or justify the judgment.

One of the grounds for a reversal urged by the appellant is, that the judgment fails to provide for his right to use the waters of the stream for culinary or domestic purposes. The claim that this right is denied by the judgment is not sustained by the

record. The judgment makes no limitation upon the use to which the water shall be applied by either of the parties, except that it shall not be used upon land which is not riparian to the stream. The principle contended for by the appellant is, that the court had no authority to render a judgment by which he would be prevented from a continual flow of the stream for these purposes, and although he has cited expressions from some opinions in support of this contention, an examination of the cases in which they occur fails to sustain the principle invoked by him. The opinion of Mr. Justice Thornton in *Stanford v. Felt*, 71 Cal. 253, was not concurred in by any of the other justices; and in *Alta etc. Irrigation Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217, it was held that the plaintiff had no interest in the waters of the stream, and, consequently, the use to which the water might be applied by either party was not before the court for consideration. By the common law, a distinction was recognized between the right of a riparian owner to the ordinary use of the water for supplying his natural wants for domestic uses and for cattle, and the right to its use for his artificial wants, such as pleasure grounds, manufacturing, etc., and although in the exercise of this right the superior proprietor might make any reasonable use of the flow of the stream for all domestic purposes, irrespective of any diminution caused thereby to the injury of an inferior proprietor, he could not exercise the right for any extraordinary use that would interfere with the rights of the inferior proprietors, or ¹⁹⁰ interrupt the regular flow of the stream, if thereby he interfered with its lawful use by them: *Miner v. Gilmour*, 12 Moore P. C. C. 156; *Wadsworth v. Tillottson*, 15 Conn. 366; 39 Am. Dec. 391.

The power of a court of equity to apportion the flow of water in a stream to the respective riparian owners, by periods of time rather than by a division of its quantity, so that each may have the full flow of the stream during such designated periods, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner would better conserve the rights of all the riparian owners, was fully considered and established in *Harris v. Harrison*, 93 Cal. 676. It was said in that case: "According to the common-law doctrine of riparian ownership, as generally declared in England and in most American states, upon the facts in the case at bar, plaintiffs would be entitled to have the waters of Harrison canyon continue to flow to and upon their land, as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity;

but in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has, by judicial decision, been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor, and this must be taken to be the established rule in California, at least where irrigation is thus necessary." In an arid country, water for irrigation may become a natural want of man, as exigent as when needed for domestic purposes, since without it vegetation would cease, and the sources of life be indirectly destroyed: See *Evans v. Merriweather*, 3 Scam. 496, 38 Am. Dec. 106. When, as in the present case, a stream, instead of increasing as it goes toward the sea, constantly diminishes, until it finally disappears or ¹⁹¹ ceases to have any appreciable volume, it is very evident that its beneficial use can be regulated better by periods of time rather than by a division of its quantity. A perpetual use of the water by all of the proprietors would be impracticable, for the reason that a perpetual use by the upper proprietor would, during a large portion of the year, entirely deprive the lower proprietor of any flow, and a just protection of the rights of both is best effected by its division in periods of time. In *Harris v. Harrison*, 93 Cal. 676, the plaintiff claimed in his complaint the right to divert the waters of the stream for domestic uses as well as irrigation, but the power of the court to apportion the water for purposes of irrigation was the point chiefly presented and considered in the opinion of the court. The same principles, however, which authorize an apportionment of the flow by periods of time for purposes of irrigation, justify such apportionment for domestic uses. The use to which different proprietors may apply the waters of the stream which flows through their lands is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied, but it is a right annexed to the land, and a part thereof, and is an inherent element of the property which he has in the land itself. This right in each proprietor is, however, relative to the rights of the other riparian proprietors, and is to be exercised with proper regard to those rights.

The evidence before the superior court has not been brought before us, and we must assume, not only that the findings of fact made by that court were sustained by the evidence, but also that the findings which were made contain all the facts which the

evidence before the court authorized it to make. As the appellant must show that the court below has committed error, it was incumbent upon him, if he would controvert the correctness of its judgment by reason of its failure to make suitable provision for his domestic needs, to show that he offered evidence upon this issue, and that the court ¹⁹² failed to give due consideration to this evidence. By invoking the aid of a court of equity to protect him in his rights, he binds himself to recognize and observe the rights which the court may determine are held by others in the same subject matter; and, if he would question the judgment of the court upon these relative rights, he must show that he presented to the court evidence of the rights which he claims the court has failed to protect. Not only does the record fail to disclose that any evidence was offered by the appellant tending to show that he requires any water for domestic uses, but the finding of the court that his tract of land without irrigation is dry and practically useless tends to destroy his claim for such uses. In the absence of the evidence, we must hold that, in its allotment of the amount of water to be given to each party, the court took into consideration all of the uses for which it was shown that the water was available, domestic uses as well as irrigation; that it considered the rights of the respective claimants, as well in view of the purposes for which the water was required, as of the amount of water available for such purposes. The finding of the court that the only way to provide for a reasonable use of the water is to divide its flow by periods of time, as well as its finding of the specific periods which, "under all the circumstances and facts in this case," would be a reasonable and equitable division of the water, must be held to be justified by the evidence, and to provide for all the uses to which either proprietor is entitled to apply the water. It cannot be said, as a matter of law, that the inferior proprietor has a necessity for a continuous flow for domestic purposes, any more than for purposes of irrigation. In either case he is entitled to only a reasonable use, and what is a reasonable use is a question of fact, depending upon all the circumstances appearing in each case. If neither of the proprietors has any use for the water, other than for domestic purposes, a court would naturally fix the length of the periods during which each should be entitled to the flow, as well as the ¹⁹³ frequency of their recurrence, different from what it would if the waters of the stream were used for irrigation; but whenever it should appear from the circumstances of the case that the only method by which either proprietor could have a reasonable use of the stream would be to allow to

each its full flow for a reasonable time, the only equitable adjustment of their rights would be to thus apportion the flow. Whether this apportionment should be for alternate weeks or alternate days, or for a specific portion of each day, must be determined by the facts of each case, and, in the absence of the evidence of these facts, the action of the trial court must be held to be correct.

The record does not disclose the amount of water flowing in the stream at any other dates than between the 1st of July and the 1st of October, or that there is at any time a flow of more than one hundred and fifty inches at the point where it enters the land of the defendant; and, although it may be assumed that the loss by absorption and evaporation is greater during the summer than in the winter, the only finding upon this point is, that when there is no more than one hundred inches at the point where the stream enters the land of the defendant, the same is all taken up by evaporation and absorption, so that none of it reaches the thousand acre tract of the plaintiff, and that in a season of average rainfall this is the actual loss between July 1st and October 1st. The loss by absorption and evaporation is so great that, without any consumption by the defendant, for any purposes, only fifty inches would reach the land of the plaintiff at any portion of this period. How much of this fifty inches is consumed or required by the defendant for domestic purposes or natural wants is not shown, but it is consistent with the findings of the court to assume that it appeared from the evidence before it that the necessities of the superior proprietor for domestic uses were such that by giving him the right to a continuous flow none of the water would reach the land of the plaintiff during the irrigating season.

¹⁹⁴ It is very evident from the record that the cause was tried with reference to the rights of the respective parties to the water for purposes of irrigation, and that the right to the water for domestic purposes was not considered an issue in the case, or made a subject of controversy at the trial. Although in his complaint the plaintiff alleged in general terms his right to the waters of the stream "for the irrigation of said land, and for culinary and domestic purposes," his specific allegations that during the irrigating season "no more water reaches his land than is required for irrigating the cultivated portion thereof," and that he has no other source of irrigating the cultivated portion of his tract than from the waters of the stream, and the further allegation that the damage which would be sustained by him in consequence of a diversion of the waters by the defendant, and for

which he sought the aid of the court, was the destruction of the fruit trees, and vines, and alfalfa, growing on the land, justify the conclusion that the right to divert the waters for irrigation was the only issue presented to the court. The finding of the court that the most valuable uses to which the water of the stream can be put is that of irrigation, and its further finding that when there is sufficient water in the stream to be available for irrigation, the portion that would be required for domestic and culinary purposes would not perceptibly diminish its value, corroborate this conclusion.

It is further contended by the appellant that, inasmuch as the court finds that he has cultivated eighty-five acres of his irrigable land, and that the respondent has cultivated only thirteen acres of its irrigable land, and as it does not appear that the respondent intends in the future to irrigate or cultivate any greater area, the judgment should not have given the defendant the use of the greater portion of the water. The right of a riparian owner to the use of the water is not, however, measured by the amount which he actually uses, and it is not to be assumed that the same amount of land will be cultivated ¹⁹⁵ in every succeeding year. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation, would be properly made a controlling element in adjusting their respective rights to the flow of the stream; otherwise, a readjustment would be necessary whenever either party should cultivate a greater or less area. The finding of the court that "the only method by which the plaintiff can be given the reasonable use of said stream is to divide the flow of the stream by time, and allow him the full flow of the stream during such time as may be reasonable," furnishes the principle upon which this portion of the judgment rests; and the further finding that "the amount of water required to irrigate such lands of the defendant and of the plaintiff as are properly susceptible of irrigation is the equivalent of a constant flow of one miner's inch, measured under a four-inch pressure, to each five acres of said land," gives the basis for the application of the principle in behalf of the respective parties. The judgment protects the plaintiff against any waste or unnecessary diversion by the defendant in case it shall not cultivate its land, or only a small portion thereof, by the provision that when it shall not actually use all or any portion of said waters upon its irrigable land the plaintiff shall be entitled to use the same.

The appellant also objects to that portion of the judgment which provides that the defendant may provide means for carry-

ing to the north line of the plaintiff's land, without diminution, all of the waters of the stream in excess of one hundred inches which shall at any time be flowing at the point where the stream enters the land of the defendant, and that, if it shall elect to do so, it shall have the right, at any of the times during which the plaintiff is, by the judgment, entitled to the use of the waters of the stream, to deliver said excess to the plaintiff at the northerly line of his tract, and that, if it shall so deliver said excess to the plaintiff during the time it shall make such delivery, it shall have the right ¹⁹⁶ to appropriate to its own use the said one hundred inches. This provision in the judgment is based upon the finding that one hundred inches of the water of the stream is lost by absorption and evaporation between the time that the stream enters the land of the defendant and before it reaches that of the plaintiff, and accords with the simplest principles of equity in the adjustment of the respective rights to the waters of the stream. The plaintiff could, under no circumstances, be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by absorption and evaporation.

The judgment is affirmed.

McFarland, J., Garoutte, J., Van Fleet, J., Temple, J., and Henshaw, J., concurred.

WATERS—RIGHT TO USE OF.—Water is the common and equal property of everyone through whose domain it flows, and the right of each to its use and consumption while passing over his possession is the same: *Tennessee Coal etc. R. R. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note. To the same effect see *White v. East Lake Land Co.*, 96 Ga. 415; 51 Am. St. Rep. 141, and note.

WATERS—USE FOR DOMESTIC PURPOSES.—Every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, subject to the limitation that each is entitled to the reasonable use of the water for domestic, agricultural, and manufacturing purposes: *Tennessee Coal etc. R. R. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note; *Ulbrecht v. Eu-faula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72; note to *Clark v. Pennsylvania R. R. Co.*, 27 Am. St. Rep. 715.

WATERS—APPROPRIATION FOR IRRIGATION PURPOSES. The right to use water for the purpose of irrigation results from the need of water upon the land, and, assuming this need in any

given case to exist equally as to all riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream: *Charnock v. Higuerra*, 111 Cal. 473; 52 Am. St. Rep. 195. What is a reasonable appropriation of water for the purpose of irrigation must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate, and a variety of other circumstances and conditions peculiar to each case, the true test being whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by other proprietors: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and note. This subject will be found fully treated in the extended notes to the following cases: *Tolley v. Correth*, 98 Am. Dec. 543; *Davis v. Getchell*, 79 Am. Dec. 643; *Heath v. Williams*, 43 Am. Dec. 281.

SPRECKELS v. NEVADA BANK.

[113 CALIFORNIA, 272.]

PLEDGE—CORPORATE STOCK—TRANSFER—INJUNCTION.—A pledgee of corporate stock, when the contract is silent upon the subject, has no right to have the pledged stock transferred on the books of the corporation into his own name before the maturity of the debt, and an injunction may properly issue to prevent such transfer.

PLEDGE—CORPORATE STOCK—RIGHTS OF PLEDGEE. Transfer upon the books of the corporation is not essential to the validity of a pledge of its stock. Hence, the pledgee is not entitled to a transfer of such stock into his name before the maturity of the debt, nor is he entitled to the surrender and cancellation of the pledged certificate and the issuance of a new one in his name, but he is entitled to have a proper entry of the transaction between himself and the pledgor made upon the books of the corporation for his protection against purchasers or other third persons.

E. P. Cole, for the appellant.

Delmas & Shortridge and F. S. Brittain, for the respondent.

274 HENSHAW, J. This is an appeal from an order dissolving a preliminary injunction.

The complaint charged the following facts: In 1894 C. A. Spreckels purchased of Claus Spreckels stocks and bonds of the Hawaiian Commercial and Sugar Company for the sum of seven hundred thousand dollars, payable one-half on or before January 4, 1895, the other half on or before January 4, 1896. To secure these payments C. A. Spreckels pledged collateral securities largely exceeding in value the amount of the debt. As additional security for this debt of C. A. Spreckels, plaintiff, Rudolph Spreckels pledged five thousand shares of the Paaubau Plantation Company, of the value of five hundred thousand dollars. This stock was pledged under an agreement

with Claus Spreckels that it should not be transferred out of the owner's name upon the books of the corporation until after maturity of the debt. In December, 1894, Claus Spreckels transferred and assigned the debt and its securities to the defendant bank, which took with notice of all conditions. The first moiety of the debt was paid when it became due, and defendant, under agreement, thereupon delivered to their respective owners one-half of the securities pledged as collateral. The half retained and still held by defendant is of more than twice the value of the unpaid debt. Defendant, before maturity of the principal debt, threatens to send, and, unless restrained, will send, the certificates of two thousand five hundred ²⁷⁵ shares of plaintiff's stock out of the jurisdiction of the court and to a foreign country, the republic of Hawaii, and will surrender the same to, and cause them to be transferred upon, the books of the Paauhau Plantation Company out of plaintiff's name, and into the name of defendant, or some of its agents. This will be done that said stock at the next election of officers of the Paauhau Company may be voted against the will and interest of plaintiff.

These threatened acts, if consummated, will impair plaintiff's credit, will deprive plaintiff of control and the courts of this country of jurisdiction of the stock, will violate the contract of pledge by preventing plaintiff from redeeming it at will, will imperil plaintiff's interests in the corporation, and impose extra burdens and large expenditures upon him by compelling him to go to a foreign jurisdiction to enforce his rights.

At the hearing of the motion to dissolve the preliminary injunction there were disputes upon certain questions of fact. It was denied that in the contract of pledge there was an agreement that the stock should not be transferred until after maturity of the principal debt. It was further denied that the defendant bank took with notice of any such agreement. And it was denied that its purpose in seeking to effect the transfer, which purpose was admitted, was anything other than to avail itself of its legal rights for its protection against possible impairment of its securities, should proceedings be instituted against plaintiff, and his property be subjected to seizure or attachment at the hands of the Hawaiian government, or some private creditor, without notice of the pledge. By the order of the court dissolving the injunction these questions of fact may be taken as having been resolved against the claim of plaintiff. They need not here be further considered.

We turn to the legal problem of the case: Has a pledgee in this state, when the contract is silent on the subject, as matter

of law, the right to have the pledgor's stock transferred upon the books of the corporation ²⁷⁶ into his own name before maturity of the debt? If not, then it is not to be denied but that plaintiff's complaint shows cause for an injunction pendente lite, and the order dissolving it was erroneous: Code Civ. Proc., sec. 526; Civ. Code, sec. 3422; *Porter v. Jennings*, 89 Cal. 440; *Ayer v. Seymour*, 5 N. Y. Supp. 651; *McHenry v. Jewett*, 90 N. Y. 61; *State v. Smith*, 15 Or. 98.

Section 324 of the Civil Code provides that shares of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid, except between the parties thereto, "until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer." It has been determined by the decisions of this court interpreting these provisions that, even without entry upon the books of the corporation, such a transfer is valid as against all but innocent purchasers and transferees in good faith, for value, and without notice. Actual notice to such an intending purchaser by one having a prior claim upon the stock, even though his claim be not noted in the books of the corporation, is sufficient: *Weston v. Bear River etc. Co.*, 6 Cal. 425; *People v. Elmore*, 35 Cal. 653; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Farmers' etc. Bank v. Wilson*, 58 Cal. 600; *Barstow v. Savage Min. Co.*, 64 Cal. 388; 49 Am. Rep. 705; *Blakeman v. Puget Sound Iron Co.*, 72 Cal. 321.

From these authorities, which declare the unquestioned rule in this state, appellant argues that a pledgee of stock would be fully protected by his power to give notice to an intending purchaser of his prior claim thereon. But this view of a pledgee's rights, we think, is altogether too strained and narrow. He should not be obliged to be on the constant watch to prevent dealings with the stock which has been hypothecated to him, at the peril of losing his security if he fails to give actual notice of his prior right to a subsequent intending purchaser or transferee.

²⁷⁷ Section 324 of the Civil Code, it will be observed, is general in its terms, and applies not merely to sales of stock, but to all transfers thereof, and thus includes transfers by way of pledge as fully as transfers by which the absolute title is parted with. We entertain no doubt, therefore, that under this section a pledgee of stock has the right, and indeed as an ordinary business precaution it may well be his duty, to cause a proper entry of the transaction between himself and his pledgor to be entered upon the books of the corporation for his protection, as the sec-

tion contemplates. The only question is, whether the mode which plaintiff and appellant here pleads is about to be taken by defendant to effectuate this end is a proper one. In the case of a sale of stock, the purchaser's right to have the stock transferred from the name of the seller into his own, and to surrender, if he desires, the old certificate, and have a new one issued to him in his own name, is unquestioned and unquestionable. But in the case of a pledgee, unless this particular form of procedure be necessary for his protection, it will not be adjudged to be within his rights, for the effect of it might be to imperil, upon the other hand, valuable rights and privileges of the pledgor. Thus, as here, it would give rise to questions involving the right to vote the stock at corporate elections, questions as to who should receive and retain dividends, questions of the removal of the stock to foreign jurisdictions, and the like. All that section 324 of the Civil Code exacts of a pledgee, for the protection of his interests, is that he should cause the transaction and the nature of it to be so entered upon the books of the corporation as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer. All this may be done to the full protection of the pledgee's rights without the surrender of the certificates, their cancellation, and the issuance to him of new ones, and, when done, the pledgee would be fully protected against a subsequent purchaser, who would be charged with the constructive notice which the entries upon the books of ²⁷⁸ the corporation import; and, upon the other hand, there would be preserved to the pledgor all the rights incident to his ownership under the pledge: *Moore v. Marshalltown etc. Co.*, 81 Iowa, 45; *Haegle v. Weston etc. Co.*, 29 Mo. App. 487.

It is not the law of this state, nor is it the law generally, that a transfer upon the books of the corporation is essential to the creation of a valid pledge: *Civ. Code*, sec. 324; *Graves v. Mono Lake etc. Min. Co.*, 81 Cal. 303, 325; *National Bank v. Watson-town Bank*, 105 U. S. 217; *Cook on Stock and Stockholders*, sec. 465.

The order dissolving the preliminary injunction is reversed.

Temple, J., and McFarland, J., concurred.

PLEDGE OF CORPORATE STOCK—NECESSITY FOR TRANSFER ON BOOKS OF CORPORATION.—Neither a notice to the corporation nor a transfer on its books is essential to the creation of a pledge of corporate stock, valid as between the pledgor and pledgee: *Smith v. Crescent City Live-Stock etc. Co.*, 30 La. Ann. 1378; *Factors etc. Ins. Co. v. Marine Dry Dock etc. Co.*, 31 La. Ann. 149. See, also, *Thompson on Corporations*, sec. 2621.

CENTER v. DAVIS.

[118 CALIFORNIA, 307.]

PARTITION--DEED FOR, BY COTENANTS.—A deed entered into by several cotenants for the purpose of effecting a partition of the common property, is void as to all of them if one of the cotenants refuses and fails to execute the deed.

J. H. Moore, W. B. Sharp, and J. T. Boyd, for the appellant.

Freeman & Bates, J. M. Nougues, and E. S. Pillsbury, for the respondents.

307 McFARLAND, J. This is an action brought by plaintiff against a large number of defendants for the purpose of quieting plaintiff's title, as against said defendants, to a certain piece of land covered by water in the city and county of San Francisco. From the answers, and statements and admissions which appear in the statement on motion for a new trial, it appears that the defendants do not deny the quantity of plaintiff's undivided interest as a tenant in common with the defendants of a large tract of land, of which the tract described in the complaint is a part. But plaintiff contends, and his complaint goes upon the theory, that he **308** is the owner in severalty of the premises described in the complaint; and this defendants deny. The court granted a nonsuit, and entered judgment in favor of defendants; and from the judgment, and from an order denying a new trial, the plaintiff appeals.

It appears that in 1854 the grantors of the parties plaintiff and defendant were the owners of a certain tract of land consisting of certain beach and water lots in the city and county of San Francisco; and it is contended by plaintiff that there has been a partition of said tract of land by which plaintiff has become the owner in severalty of that part of said tract which is described in the complaint. The first step in the process by which said plaintiff claims that said partition was effected is a trust deed made June 7, 1854. In that deed some fifteen different persons are named as parties of the first part, or grantors, and one Joseph E. Gary is named as party of the second part. It is shown by the parol testimony introduced by plaintiff that the purpose of said deed was to effect a partition through the process of all the cotenants conveying to said Gary with the understanding that said Gary was to reconvey to each of the cotenants in severalty the share to which he was entitled. The deed itself contains this clause: "The object of this conveyance to the party of the second part is for the sole purpose of dividing the pieces

or parcels of land hereinafter described, that deeds may come direct from the party of the second part to the parties of the first part, according to their respective interests." The defendants make several objections to the validity of this deed. They say, in the first place, that it was not signed and executed by all of the persons named therein as parties of the first part and co-tenants. It is a fact that several of said parties did not sign said deed. It is claimed, however, by plaintiff that some of those not signing had no interest in the property; but this question is not necessary to be discussed here, because it is admitted that Samuel Todd was one of the tenants in common of the land of which that mentioned in the ³⁰⁹ complaint is a part, and that he refused to sign the deed, and did not sign it. It is contended also by defendants that this deed to Gary included other lands to which, as it afterward appeared, none of the parties to said deed had any title; and it is contended that this vitiated the whole deed, upon the authority of *Emeric v. Alvarado*, 64 Cal. 529. It is also contended that the deed was void because it did not describe the quantity of interest of the various parties, and presented no basis upon which a partition could be effected.

We deem it necessary to notice only the first objection above stated to the validity of said deed. Todd, not having signed the deed, and having refused to sign it, it was, as a deed contemplating partition, void: *Gates v. Salmon*, 46 Cal. 361; *Hill v. Den*, 54 Cal. 7; *Sutter v. San Francisco*, 36 Cal. 112. "A contract which is entered into by several parties for the purpose of effecting a partition of land which they hold in common must be binding upon all the parties, or it binds none"; *Gates v. Salmon*, 46 Cal. 360. The plaintiff contends that this difficulty was obviated by the fact that both Gary and Todd afterward deeded their interest to the grantor of plaintiff; but, waiving all other considerations, the deed to Gary, for the reason above given, was inoperative, and did not confer upon Gary the right to convey the interests of the parties who had signed the trust deed. There is no pretense here that there was any partition of the tract by actual occupation of different parts of it by the tenants in common respectively, in accordance with any parol agreement; the whole tract was covered by water, and there was no separate possession of particular parts of it taken by the individual tenants in common. Neither was there any partition by mutual conveyances between all the tenants in common.

For the reasons above stated, the court below was warranted in holding that the plaintiff had made out no case for the relief asked in his complaint as a tenant in severalty of the tract of

land therein described; and the ³¹⁰ nonsuit was, therefore, properly granted. These views make it unnecessary to particularly notice other positions taken by respective counsel.

The judgment and order denying a new trial are affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

PARTITION.—A partition deed in which all the heirs join constitutes as valid a division as one made by order of the probate judge, provided all the grantors are of age, and the estate is in a condition to be legally divided: *Hubbard v. Ricart*, 3 Vt. 207; 23 Am. Dec. 198. An absent cotenant not assenting to partition may repudiate it by demanding a new partition of the whole tract, or he may adopt it by ratifying the acts of one who has assumed to act for him in such partition: *McMahan v. McMahan*, 13 Pa. St. 376; 53 Am. Dec. 481.

BENNETT v. DAVIS.

[118 CALIFORNIA, 337.]

MECHANICS' LIENS—CONSTRUCTION OF MANTELS—CONTRACTOR OR MATERIALMAN.—A person who contracts with the owner of a building in process of construction to set up therein mantels already put together, the labor of delivering and setting up the mantels being small as compared with their value, is, within the meaning of the mechanics' lien law, a materialman, and not an original contractor.

MECHANICS' LIENS—CONTRACTOR OR MATERIALMAN. If the labor bestowed upon placing materials in a building in process of construction is trifling as compared with the price of the materials, the person furnishing such labor and materials is a materialman, and if the value of the materials is trifling in value as compared with the labor, he is an original contractor, within the meaning of the mechanics' lien law.

C. S. Peery, for the appellants.

Vogelsang & Brown, for the respondents.

³³⁷ **TEMPLE, J.** This is an action for the foreclosure of a mechanic's lien. In the complaint it is averred that ³³⁸ plaintiffs contracted and agreed with defendants "to furnish in the addition to, and in the alteration of, the certain building heretofore erected on said premises by said Davis, certain materials, to wit, certain mantels, tiles, and grates, and the appurtenances thereof; and also the labor required in the addition of the same to, and the erection of the same in, said building as a part thereof," etc.

The mantels and other materials were furnished and were

erected in the house of defendant Davis, and the only question presented here is, whether plaintiffs, in the purview of the mechanics' lien law, are materialmen or original contractors.

As the court found in favor of the lien, the inquiry resolves itself into this: Is there evidence upon which the conclusion can be sustained? One was a wooden mantel, and the other what the witness called a tiling mantel.

Schutte testified that a tiling mantel is composed of numerous parts, from one hundred and fifty to ten thousand. "The tiling is placed in the building by attaching it to the brickwork and to the chimney. It is not nailed; it is a material part of the chimney; an integral part of the chimney itself. It is attached to the brickwork surrounding the mantelpiece; we cement it to the brickwork. It is put there permanently and not for temporary use. They are part of the mantel proper, as much as a door is to a house." He further said that the contract was to furnish the materials and the labor necessary to put them up. They kept the mantels in their store for sale, put together, as they would appear when finally put up. The brickwork was done by the contractor, but they set up the mantels, built the fireplaces and inclosed them. They agreed upon the price of the mantels with the regular grate set up.

The question is somewhat similar to that which sometimes arises under the statute of frauds—the precise issue being whether a contract is one of sale or for ³³⁹ the manufacture of goods. Numerous decisions have been rendered in such cases, and, so far as I know, no rule universally applicable has been formulated. The cases seem generally to turn upon the relative value of the work and goods, or how far the article was modified by the work.

In *Bates v. Coster*, 1 Hun, 400, it was said that when the article existed in its entirety, but something is to be done to fit it for use, it is a sale. In *Flint v. Corbitt*, 6 Daly, 429, it was said, when an article is exposed for sale in an unfinished state, that the finish may be done to suit a customer, it is a sale and not a manufacture. In *Fitzsimmons v. Woodruff*, 1 Thomp. & C. 3, a marble mantel was sold to be set up; it was held that putting it up was a part of the delivery. In *Cooke v. Millard*, 65 N. Y. 353, 22 Am. Rep. 619, in relation to mechanics' liens the criterion is said to be whether the work is simply done on the materials to complete a delivery of them in a finished condition—the cost of the labor being included in the price of the things sold.

It must be confessed that no satisfactory rule can be deduced from these cases. Each seems to assume the question at issue. The main consideration, after all, is whether the labor bestowed upon the article was merely trifling in comparison to the price.

The same thing appears in the two cases decided by this court—one of which is relied upon by the appellants and the other by the respondent.

Hinckley v. Field Biscuit etc. Co., 91 Cal. 136, was a case where plaintiff contracted to furnish “and to deliver and put in place, upon foundations prepared by said Arthur Field in said structure, building, and factory, a steam plant, consisting of boilers, engine, heater, feed pipes, etc.” Plaintiff was held to be a materialman only, and it was said: “The work done by them on the premises of defendants, in placing them in position, was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors ³⁴⁰ for the erection of the factory, or any part of it, within the true intent of the statute.”

In *La Grill v. Mallard*, 90 Cal. 373, it was held that a person who contracts to paper and decorate several rooms in a building and furnishes the material is an original contractor.

I see little difference in the cases, save in the relative amounts of material and labor. In the last case, the contract was to decorate as well as to hang paper, and further the defendant promised to pay for the labor in decorating the building. The material used in decorating a room may be very trifling in comparison to the labor.

The main point discussed in *La Grill v. Mallard*, 90 Cal. 373, was whether an implied contract to pay was such a contract as is specified in the mechanics' lien law.

The labor required to place the engines and machinery in proper position in the case of *Hinckley v. Field Biscuit Co.*, 91 Cal. 136, was evidently much greater than the labor performed in *La Grill v. Mallard*, 90 Cal. 373, but relatively to the material furnished it was much less. In the one case the material was not only the principal thing, but compared to it the work was trifling. In the other the work was the important matter.

One of the defendants testified that some tile mantels are composed of more than ten thousand pieces, and that it sometimes required two days to put one up. He did not say that it required two days or two hours to put up the one in question. Even had it taken two days the labor would still have been comparatively trifling.

I think the case directly within the decision of *Hinckley v. Field Biscuit Co.*, 91 Cal. 136, and therefore the judgment and order are reversed.

McFarland, J., and Henshaw, J., concurred.

In *Wilson v. Hind*, 113 Cal. 357, the court decided that a person who makes a contract with the original contractor to furnish all the mill work required in the erection of a building, consisting of manufactured material to be delivered at the building, is a materialman only and not a subcontractor, and one who furnishes such manufactured material to such materialman cannot acquire a mechanic's lien upon the building for the material so furnished.

MECHANIC'S LIEN—THE LIEN OF MATERIALMEN and when the same is enforceable is the subject of the monographic note to *Chapin v. Persse etc. Paper Works*, 79 Am. Dec. 268-278.

PEOPLE v. DE WINTON.

[113 CALIFORNIA, 403.]

ARSON—BURNING ONE'S OWN HOUSE.—A person cannot be convicted of arson in setting fire to and burning his own house, of which he is the occupant, even though the burning is with intent to destroy the buildings of others.

ARSON — INDICTMENT — OWNERSHIP.—An indictment charging arson must allege that the building burned was at least the qualified property of, or in the possession or occupancy of, another than the accused.

ARSON—INDICTMENT—IDENTITY OF NAME—PRESUMPTION.—If an indictment charges the accused with arson in burning the house of a person of the same name as himself, identity of person is presumed from identity of name, and the indictment must be construed as charging the accused with burning his own house.

W. F. Fitzgerald, attorney general, H. E. Carter, and C. H. Jackson, deputy attorney general, for the people, appellant.

Reddy, Campbell & Metson, for the respondent.

404 VAN FLEET, J. This is an appeal by the people from an order arresting the judgment upon a conviction of arson, the question being whether the indictment sufficiently charges the offense.

The material part of the indictment is that: "The said William W. de Winton on," etc., at, etc., "did willfully, maliciously, and feloniously, in the night-time, set fire to and burn a building, namely, a house then situate," etc., "the property of William W. de Winton, with **405** the malicious, willful, and felonious intent then and there to destroy said building." Then follows an averment that said house was situated in such immediate prox-

imity to inhabited buildings, occupied by human beings, as to endanger life, etc., and did, then and there, threaten the lives of said human beings from said fire, etc.

Giving effect to the presumption which the law raises of identity of person from identity of name (Code Civ. Proc., sec. 1963, subd. 25), and it will be observed that the indictment charges the defendant with the burning of his own building.

At common law a man was not guilty of arson in willfully burning his own house, unless the house of his neighbor was thereby also burned; and this, even though the burning was with intent to destroy his neighbor's house: 4 Blackstone's Commentaries, Wendell's ed., 221. Arson has always been regarded as essentially an offense against the security of the dwelling or habitation, rather than against the property: 1 Wharton's Criminal Law, sec. 825; 2 Bishop's Criminal Law, sec. 24; *People v. Fisher*, 51 Cal. 319; and the right to destroy his own dwelling was doubtless founded upon the right which the law accords to a man of making such use of his property as he may see fit, so long as others are not thereby injured: 1 Bishop's New Criminal Law, sec. 514.

In charging arson, therefore, it was always necessary, at common law, to aver the ownership of the building burned in another. And such is the rule in this country where not changed by statute. For this purpose, one in possession or occupancy of the premises at the time of the offense was deemed the owner, but it was essential that this should be averred and shown to be other than the defendant: *State v. Keena*, 63 Conn. 329.

If these principles are to be applied to the present indictment, it is quite obvious that it does not charge arson. It describes the building burned as the property ⁴⁰⁶ of the defendant, and fails to aver its occupancy or possession by anyone; and, being silent, the presumption is, that it was in possession and occupancy of the owner. Nor is the pleading in any way aided in this respect by the averment that the house was so situated as that the burning thereof endangered the lives of inhabitants of other dwellings. It may be that this matter would make the indictment good as a charge of attempt to commit arson, but it does not help out the statement of the principal offense.

The question, therefore, arises whether our statute has so changed or modified the definition of arson as to avoid this requirement of the common law; and this, we think, must be answered in the negative.

Section 447 of the Penal Code provides: "Arson is the will-

ful and malicious burning of a building with intent to destroy it." If this section stood alone as a definition of the offense, there might be strong ground for holding the statement of the offense in the indictment sufficient, as substantially following the language of the statute. Under that section, literally construed, the burning of any building, of whatsoever character, maliciously and willfully, whether owned or occupied by the defendant or another, would constitute the offense; and the rule of the common law, that a man could not be held guilty for burning his own house, would be effectually abrogated. But that this result was not contemplated, and no such radical change in the law of arson intended, is, we think, made quite clear from a consideration of section 452, which relates to the same subject. That section provides:

"To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that, at the time of the burning, another person was rightfully in possession of, or was actually occupying, such building, or any part thereof."

This section is manifestly a limitation upon the sweeping terms of section 447, and implicitly contemplates ⁴⁰⁷ that, to be the subject of arson, the building must be, at least, the qualified property of another—must be, at least, rightfully in the possession or occupancy of another at the time of the offense.

And we think that obviously this fact was intended to remain, as at common law, a substantive feature of the offense, which is an essential feature of its description, and must be alleged in order to charge the offense: *People v. Myers*, 20 Cal. 76.

In that case, which arose under the statute as it existed prior to the code (1 Hittell's Gen. Laws, sec. 1557), where the definition of arson in the first degree was, like section 447, wholly silent as to the ownership of the burned building, the court, in considering an objection to the sufficiency of the averment as to the ownership of the property, say:

"It is essential that the indictment should show that the building burned is the property of another: *East's Pleas of the Crown*, 1034. And this was so held where the statute, like ours, did not say so in terms: *People v. Gates*, 15 Wend. 159. The allegation of the ownership of the building burned is a part of the description of the offense. It is a general rule of criminal pleading, as well as a provision of our statute (*Criminal Practice Act*, sec. 239), that the indictment must be direct and certain as it regards the offense charged. In this indictment it is altogether uncertain,

whether the building burned was the dwelling-house of Lemon or the Chinaman. It may be conjectured that it is intended to assert that the general property was in Lemon, and the special property, or the possession with an interest, was in the Chinaman, and the statement that the Chinaman was then in the dwelling-house would aid this conjecture. But the meaning of such an averment, if it were admissible to make such an averment in this form, cannot be left to rest upon conjecture or to be made out by an argument. The defendant must be distinctly informed whose dwelling-house he is accused of burning. It is urged, in reply, that surplusage may be ⁴⁰⁸ rejected. But no allegation which is descriptive of the identity of what is legally essential to the charge in the indictment can be rejected as surplusage."

In *People v. Gates*, 15 Wend. 159, cited in the last case, it is said in construing the statute of New York defining arson: "The statute does not say in terms that the house, the burning of which in the night-time constitutes arson in the first degree, shall be the house of another, but such must necessarily be the construction. In defining arson in the third degree the language is this: 'Every person who shall willfully set fire to or burn in the night-time the house of another, not the subject of arson in the first or second degree,' shall be adjudged guilty of arson in the third degree: 2 Rev. Stats., sec. 4, p. 667. The legislature did not intend to require greater particularity in the offense in the third degree than in the first and second, in both of which the punishment is more severe than in the third. According to the literal construction of the section defining the offense of arson in the first degree, a man might be punished with death for burning his own house in his own possession. I apprehend such was not the intention of the legislature, but that the common law may be called in aid of the definition of the offense, particularly when taken in connection with the section above referred to, defining arson in the third degree. If this qualification should be annexed to the offense of arson in the first degree, it must be equally applicable to the same offense in the second degree; and, testing this indictment by the rules laid down in the books which have been cited, it will be found defective."

In *People v. Russel*, 81 Cal. 617, this court would seem to have taken the same view of the provisions of the code. In that case the information charged and described the building as the property of another than the defendant, and in passing upon an ob-

jection to the sufficiency of the pleading in another particular, it is suggested that the information is drawn in accordance with the statute, and is good: See, also, *People v. Fisher*, 51 Cal. 319, 409 where impliedly the same construction was sustained.

From these considerations we are of opinion that the indictment in this case did not charge defendant with arson, and that the judgment was therefore properly arrested.

Order affirmed.

Harrison, J., and Garoutte, J., concurred.

ARSON—BURNING ONE'S OWN HOUSE.—Arson is the malicious firing of the habitation of another: *State v. Toole*, 29 Conn. 342; 76 Am. Dec. 602, and note; *Mary v. State*, 24 Ark. 44; 81 Am. Dec. 60, and extended note.

ARSON—INDICTMENT.—ALLEGATIONS OF OWNERSHIP are discussed in the extended note to *Mary v. State*, 81 Am. Dec. 71.

NAMES.—IDENTITY OF NAMES is prima facie proof of identity of persons: *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877.

KILBRIDE v. MOSS.

[113 CALIFORNIA, 432.]

GUARANTY—STATUTE OF FRAUDS—VERBAL CONTRACT, WHEN ORIGINAL.—If a person is induced to purchase stock in a corporation by the request and verbal promise of a stockholder therein, that he will return to the purchaser the money paid for the stock if it shall become worthless, such promise is an original contract, not required to be in writing, and which binds the promisor personally. Such promise is not a verbal contract of guaranty, nor to answer for the debt, default, nor miscarriage of another.

GUARANTY IS A COLLATERAL UNDERTAKING and cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no substantive liability on the part of a third person, either express or implied, that is to say, no debt, default, or miscarriage of another, present or prospective, there can be no contract of guaranty.

STATUTE OF FRAUDS—ORIGINAL CONTRACT.—If there is no primary liability of a third person to the promisee which continues after the promise is made, it is an original promise and need not be in writing.

E. M. Gibson, W. Whitmore, and Reed & Nusbaumer, for the appellants.

Fitzgerald & Abbott, for the respondent.

⁴³³ **SEARLS, C.** This is an action to recover fifteen hundred dollars under the following circumstances:

The "California Lustral Company" was a corporation duly or-

ganized under the laws of the state of California. Defendant Franklin Moss was a large stockholder therein, a director and vice-president of the company, and, with another, held a mortgage upon the property of the company.

The corporation was indebted to sundry creditors, some of whom were pressing payment.

Plaintiff had fifteen hundred dollars, and defendant Moss proposed to him to purchase therewith six thousand shares of the capital stock of the corporation, and at first offered to secure him therefor by a second mortgage on the corporate property. This offer was declined.

Thereupon it was verbally agreed between plaintiff and defendant that the plaintiff should purchase the six thousand shares of stock, pay fifteen hundred dollars therefor to the company, and, in the event that the stock became worthless or of no value, he, the said defendant, would return and pay to plaintiff the said sum of fifteen hundred dollars.

This was on the 25th of May, 1891. Plaintiff purchased ⁴³⁴ the stock, paid therefor the fifteen hundred dollars which was used in payment of company debts.

In 1892, the capital stock of the corporation having become worthless and of no value, plaintiff offered to return the same to defendant and demanded payment of the fifteen hundred dollars, all of which was refused. Plaintiff thereupon brought this action and obtained judgment for said fifteen hundred dollars, from which judgment and from an order denying his motion for new trial defendant appeals.

At the trial defendant's counsel objected to all evidence tending to show a verbal guaranty by defendant of the stock or its value. The objection was overruled, and the ruling is assigned as error.

A guaranty is defined by section 2787 of the Civil Code as follows: "A guaranty is a promise to answer for the debt, default, or miscarriage of another person."

Under section 2793 of the Civil Code a guaranty, save in the cases excepted by the following sections, "must be in writing and signed by the guarantor, but the writing need not express a consideration."

Under section 1624 of the same code "a special promise to answer for the debt, default, or miscarriage of another" (except as provided in section 2794) is void, unless the contract or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent.

Appellant contends that defendant was a guarantor, and that the action is brought against him as such.

The complaint sets out the facts much as we have stated them, but more in detail and more fully.

If these facts constitute him a guarantor the contention of appellant is sound, but, if the converse of the proposition is maintained, defendant is neither a guarantor nor surety.

Much learning has been exhibited, many fine distinctions drawn, and, we may add, a good deal of discrepancy is to be found upon some of the many branches of the law relating to guaranty.

⁴³⁵ The present case, however, seems to us to involve but a single, plain, fundamental principle not calling for extended discussion. It is this: The contract of guaranty is a collateral undertaking. It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person, either express or implied, that is to say, if there is no debt, default, or miscarriage, present or prospective, there is nothing to guarantee, and hence can be no contract of guaranty.

If there is no primary liability of a third person to the promisee which continues after the promise is made, it is an original promise and need not be in writing.

Applying this doctrine to the case at bar, and we fail to discern any primary liability on the part of anyone to the plaintiff upon which to base a guaranty.

The corporation from which he purchased the shares of capital stock owed him no duty in the premises after such purchase was consummated, except the general obligation to him, in common with all other shareholders, to fairly and impartially conduct the business of the company in such manner as would best promote the interests of all concerned.

The corporation simply sold him six thousand shares of its stock and received payment therefor. This closed the incident so far as the company was concerned.

It was the defendant who entered into contract with him, whereby, as an inducement for plaintiff to purchase, he promised to refund his money should the stock become worthless. This was an original contract.

Moorehouse v. Crangle, 36 Ohio St. 130, 38 Am. Rep. 564, is in point. There C., who was a large stockholder of a business corporation and president thereof, verbally promised M. that if he would subscribe and pay five hundred dollars to the capital

stock of the company he should, within one year, receive fifteen per cent on the amount invested. M., in consideration of this promise, subscribed, and paid for the stock. No ⁴³⁶ dividends were made or earned within the year. Held, that this was not a contract to answer for the debt, default, or miscarriage of another, but an original contract, upon the proof of which plaintiff was entitled to recover.

Johnson, J., in discussing the case, said: "The terms of the statute make it clear that a collateral promise, or one to answer for the liability of another, is one where there is a debt or obligation of another than the promisor for whose default he undertakes to be liable. An original liability of another is the foundation of the collateral liability of the promisor. . . . If this contract is not within the statute of frauds, the plaintiff is entitled to recover, as it is not doubted but that the consideration stated is sufficient. Was there any debt, obligation, or legal duty, express or implied, owing by the corporation to the plaintiff as a stockholder, for which the defendant undertook to answer upon default of the corporation?" The learned judge, after defining the duties of the corporation to its stockholders, adds: "The defendant did not undertake to answer for any debt, default, or miscarriage by the corporation growing out of a failure to perform any of these duties. . . . Defendant's contract was, in legal effect, essentially different from the obligations of the corporation in favor of plaintiff as a stockholder, and the liability created was wholly independent of any default by the corporation. It was not an undertaking to answer for the default of the corporation."

In *Hill v. Smith*, 21 How. 283, plaintiff had sold land to a railroad company, receiving in payment therefor the stock of the company, which the defendant guaranteed should be at par within three years. This was held an original, and not a collateral, contract.

Stress was laid by counsel upon the use of the word "guaranty" in the contract as importing a collateral agreement, but the court held that the term, when taken in connection with the other provisions of the agreement, showed it to be an original contract.

⁴³⁷ *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74, is to like effect: See, also, notes to *Forth v. Stanton*, 1 Saund. 211. Applying the reasoning of these cases to the case in hand, and the question involved is solved in favor of plaintiff.

Objections are urged to the sufficiency of the evidence to support some of the findings.

These questions need not be discussed, for the reason that there was clear and unequivocal evidence in favor of plaintiff upon each and every of the issues. That defendant's testimony contradicted some of it is not cause for disturbing the findings of the court.

The judgment and order appealed from should be affirmed.

Vancielief, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

GUARANTY—COLLATERAL UNDERTAKING—STATUTE OF FRAUDS.—A verbal promise to pay the debt of another if he does not pay it is not an original undertaking, but a collateral one within the statute of frauds: *Dufolt v. Gorman*, 1 Minn. 301; 66 Am. Dec. 543: "I will see you paid if A employs you" is a collateral undertaking and must be in writing: *Skinner v. Conant*, 2 Vt. 453; 21 Am. Dec. 554, and note. The question as to whether contracts of indemnity are within the statute of frauds is fully treated in the extended note to *Smith v. Delaney*, 42 Am. St. Rep. 186-194.

MURPHY v. WATERHOUSE.

[113 CALIFORNIA, 467.]

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—If an attorney is acting as agent for both parties to a negotiation, or if they are negotiating with each other in the presence of the attorney of one of them, the communications made in the presence of all of the parties are not privileged as between themselves, and the attorney may be compelled by either to testify thereto, in a suit between them growing out of such negotiations.

ACTION—INSTRUCTIONS—WEIGHT OF EVIDENCE.—In a civil case, it is error to instruct the jury that there must be sufficient evidence to "convince their minds" of any fact necessary to be shown. The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case.

Denson & De Haven and M. A. Dorn, for the appellant.

Lindley & Eickhoff, for the respondent.

Sawyer & Burnett, for Pacific Bank, intervenor.

⁴⁶⁹ **McFARLAND, J.** This action was brought upon a promissory note for ten thousand dollars, made by the defendant, Waterhouse, to the Pacific Bank, and alleged to have been assigned by said bank to the plaintiff Murphy. Afterward, however, the plaintiff Murphy withdrew his claims to the note, and the contest was thereafter between the Pacific Bank, intervenor,

and the defendant, Waterhouse. The case was tried with a jury, who returned a verdict in favor of the intervenor for the amount of the face of the note. Defendant, Waterhouse, appeals from the judgment.

The defense set up by the appellant, Waterhouse, was that there was no consideration for the note. The facts alleged by him were that the Pacific Bank requested appellant to place the apparent or record title of three hundred shares of the stock of the People's Home Savings Bank in his name for the benefit of the said Pacific Bank; that appellant was to hold said stock in trust for said Pacific Bank; that the promissory note sued on in this action was given by appellant to said Pacific Bank for the purpose of protecting said bank in case of the ⁴⁷⁰ death of defendant, or any other contingency, and as collateral security for the performance by appellant of his agreement to hold said stock of the People's Home Savings Bank in trust for the said Pacific Bank; that the real ownership of the stock was to remain in the Pacific Bank, and that appellant had the right at any time to transfer the stock to the said Pacific Bank and receive back the said note.

At the trial of the cause, the appellant testified substantially to the matters of defense above stated. He then called as a witness D. S. Dorn, who is an attorney at law, and proposed to prove by him (in substance) that he was present when the said contract testified to by appellant was made between him and one McDonald, who was acting for said Pacific Bank, and witnessed the contract. The intervenor objected to any testimony of said Dorn as to anything that passed on said occasion between the appellant and said McDonald, upon the ground that said Dorn was at that time the attorney and counselor for said Pacific Bank, and that anything that occurred upon said occasion should be excluded because privileged as a communication between client and attorney. The objection was sustained, and the appellant excepted. This ruling of the court excluding the offered testimony of Dorn was clearly erroneous. It appears, we think, very plainly from the testimony of Dorn, that at the time of the transaction referred to he was also the attorney for the appellant, Waterhouse. Assuming that to be the fact, then the point was expressly decided in favor of the contention of appellant by this court in *In re Bauer*, 79 Cal. 304. In that case this court said: "When two persons address a lawyer as their common agent, their communications to the lawyer, so far as concerns strangers, will be privileged, but, as to themselves, they stand on the

same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations": Citing numerous authorities. The rule, however, is the same where the witness is attorney for only one of the contracting parties. Where two persons ⁴⁷¹ are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction, and the circumstances surrounding it, are inconsistent with the notion of a confidential communication between one of the parties and his attorney who happens to be present. "The rule deducible from the authorities is, that all communications made by a client to his counsel for the purpose of professional advice or assistance are privileged, whether such advice relates to a suit pending, one contemplated, or any matter proper for such advice or aid; that where the communications are made in the presence of all the parties to the controversy, they are not privileged, but the evidence is competent between such parties": *Britton v. Lorenz*, 45 N. Y. 51. In *Coveney v. Tannahill*, 1 Hill, 33, 37 Am. Dec. 287, the court say: "It is not necessary that a man should have an attorney to hear his dealings with third persons, and, if one is called in, I see no reason why he, like any other person, should not be sworn to prove what was done. . . . What was done and said between the plaintiff and Tannahill in the way of business cannot be turned into a confidential communication between attorney and client merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to the attorney, and he might have been required to answer, not only when and where the account was signed, but as to everything that was done and said between the plaintiff and Tannahill on that occasion, so far as the matter would be pertinent, if proved by any other witness. If any communication passed between the attorney and client apart from Tannahill, these may be privileged, but nothing else." In *Hughes v. Boone*, 102 N. C. 137, the supreme court of North Carolina say: "So, too, it has been held by numerous adjudications the rule does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or when made by one party to his counsel in the presence of the other party, or where made by ⁴⁷² one party to the attorney of the other party." In 1 *Greenleaf on Evidence*, section 245, it is said, among other things, that an attorney may be compelled to disclose "a statement made by him [the client] to the adverse party. In *Griffith v. Davies*, 5 Barn. & Adol. 502, it was held

that "the fact of the witness having been present as attorney on one side does not prevent his giving evidence of a conversation between the parties": See, also, *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482; *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; *Hanlon v. Doherty*, 109 Ind. 37; *Greenleaf on Evidence*, secs. 244, 245, and notes; *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114. The provision contained in subdivision 2 of section 1881 of our Code of Civil Procedure is merely a declaration without any substantial modification of a principle that has always obtained: *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482; it was therefore perfectly competent for appellant to prove by Dorn what occurred between the appellant and McDonald, acting for the bank, at the time when, as appellant claims, the transaction took place between McDonald and himself, out of which the trust relation which he claims arose.

But respondent contends that the ruling of the court in excluding the testimony of Dorn, although erroneous, did no material injury to appellant. This position cannot be maintained. If Dorn had testified, and his testimony had corroborated that of appellant, the verdict of the jury might have been different—at least this court would not be justified in saying that it might not have been different. For this reason, therefore, the judgment must be reversed.

The appellant contends, also, that the court erred in asking of its own motion a certain question of the appellant while he was on the witness stand. It is contended that said question prejudiced the appellant before the jury, and was an unwarrantable interference by the court with a matter that belonged to the jury. We think that said question—which it is not necessary here for us to state in full—was improper; but it is not ⁴⁷³ necessary for us to determine whether the matter was serious enough to warrant a reversal of the judgment. It probably will not be repeated upon another trial.

We do not think that the court erred in admitting in evidence a part of a statement made by the appellant to the bank commissioners.

We see no error in the instructions given by the court to the jury, or in the ruling upon instructions offered, except that part thereof which relates to the amount or quantity of evidence necessary to sustain the burden of proof. The court, after having told the jury that the burden of proof was upon appellant to show that there was no value or consideration for the note, said:

"It is for him to satisfy you by such evidence as convinces your mind that no value was paid for that note." In a civil case it is error to tell the jury that there must be evidence sufficient to convince their minds of any fact necessary to be shown by either party. The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case.

The judgment appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—Communication by several persons who employ the same attorney in the same business, made by them to such attorney in relation to such business, while privileged as to their common adversary are not privileged as between themselves: Seip's Estate, 163 Pa. St. 423; 43 Am. St. Rep. 803, and note. To the same effect see Hanson v. Bean, 51 Minn. 546; 38 Am. St. Rep. 516, and note.

INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.—The court cannot instruct upon the weight of evidence or the credibility of witnesses: Osborne v. Francis, 38 W. Va. 312; 45 Am. St. Rep. 859.

PHILLIPS v. HAGART.

[113 CALIFORNIA, 552.]

EJECTMENT—PLEADING—ALLEGATION OF TITLE BY DEFENDANT.—An answer by a defendant in ejectment, by which he alleges title in himself, amounts to a general denial only, and is not a cross-complaint, requiring denial by the plaintiff.

EXECUTION SALES—REDEMPTION.—A certificate of redemption from an execution sale is no part of the redemption, and the refusal of the sheriff to issue such certificate to the person redeeming is immaterial.

EXECUTION SALES—REDEMPTION—SUCCESSOR IN INTEREST.—The grantee of a judgment debtor whose land has been sold under execution pursuant to foreclosure is a "successor in interest" of the judgment debtor, and not a "redemptor" within the meaning of sections 701 and 705, California Code of Civil Procedure, and he is entitled to redeem in the same manner as the judgment debtor.

SHERIFF'S DEEDS—RECITALS—CONCLUSIVENESS OF. A recital in a sheriff's deed given to the purchaser at mortgage foreclosure sale that there has been no redemption from the sale, is not conclusive upon the judgment debtor, his grantee or successor in interest, who has made a valid redemption, and the latter may show by collateral attack that such recital is false.

Wallace & Wallace, Pullen & Wallace, and Armstrong & Bruner, for the appellant.

J. M. Fulweiler and F. P. Tuttle, for the respondents.

553 GAROUTTE, J. This action involves the right of possession to a certain tract of land, and the complaint is in the

usual and ordinary form for such cases. The appeal presents but few questions for the court's consideration.

One Morrison was the owner of the land. While such owner, a mortgage resting upon it was foreclosed, and the defendant, Hagart, became the purchaser at the sale under the foreclosure proceedings. Thereafter, and within the time allowed for redemption, Morrison transferred the property by deed to these plaintiffs, who at once took steps to redeem from the sheriff's sale. Notwithstanding the acts of plaintiffs in attempting to redeem, the sheriff refused to issue a certificate of redemption, and, in due course, gave a deed of the property to the defendant as a purchaser at the sale. Defendant relies upon this deed for title, while plaintiffs assert title by reason of their deed from Morrison, coupled with the claim that the acts performed by them ⁵⁵⁴ looking toward a redemption were sufficient in law to accomplish that result.

As already suggested, the complaint was in the simple and ordinary form as for an action in ejectment. Defendant, by answer, denied the allegations of the complaint, and set out his title in detail, consisting of the sheriff's deed and the proceedings upon which it was based. Plaintiff answered defendant's pleading by denials. It is now claimed by defendant that the affirmative matters set out in his answer constituted a cross-complaint, and that certain allegations thereof must be deemed to be true by reason of insufficient denials thereto. Upon the insufficiency of these denials we will not dwell, for the contention seems to be immaterial. The affirmative matters set out by defendant in no sense constituted a cross-complaint, and no denial of them was necessary. A recital by defendant of his title was no more than a denial of plaintiff's title, and opened the door no wider for the admission of evidence. Whatever defendant was entitled to prove, under his pleading as he framed it, he was entitled to prove under a general denial. An allegation of title in himself by defendant, in an action of ejectment, is but a general denial in an argumentative form: *Marshall v. Shafter*, 32 Cal. 192; see *Cooper v. Miller*, 113 Cal. 238.

Did plaintiffs, as successors in interest of Morrison, the judgment debtor, redeem from the sheriff's sale to defendant Hagart? It is conceded that the sheriff refused to issue a certificate of redemption to plaintiffs, but, as to the fact of a redemption, that circumstance is immaterial, for the issuance of the certificate is no part of the redemption. Appellants, who attack the sufficiency of the redemption, insist that plaintiffs were "redemptioners" in the

sense of the word as used in section 705 of the Code of Civil Procedure, and as such redemptioners failed to comply with the demands of that section, and therefore failed to perfect their attempted redemption. Upon the part of plaintiffs it is insisted ⁵⁵⁵ that they were not "redemptioners," as the term is there used, but "successors in interest" of the judgment debtor, and, consequently, not required to follow those provisions of the statute.

Section 701 of the Code of Civil Procedure declares: "Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest: 1. The judgment debtor, or his successor in interest in the whole or any part of the property; 2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are in this chapter termed 'redemptioners.'"

It is thus observable that judgment debtors and their successors in interest do not come within the class termed "redemptioners," and, therefore, are not required to follow the demands of section 705 in making a redemption. While the successor in interest of the judgment debtor is only mentioned in section 701, and the succeeding sections refer to the judgment debtor and redemptioners alone, still that fact is not material. The statute declares that successors in interest have the right to redeem, and further declares in effect that they are not to be considered redemptioners as the word is there used. Under such conditions successors in interest stand in the place of judgment debtors, and when the statute uses the term "judgment debtors," as contradistinguished from "redemptioners," the words should be construed broad enough to include successors in interest of judgment debtors. That such was the intention of the legislative mind there can be no question, and that the successor in interest of the judgment debtor possesses the rights given by the statute to the judgment debtor, rather than those of the redemptioner, there is likewise no question.

It is insisted that the recital in the sheriff's deed ⁵⁵⁶ given to defendant, Hagart, that there had been no redemption from the sale to defendant, was conclusive upon the judgment debtor, Morrison, and his successors in interest, these plaintiffs, and that until such deed was attacked and set aside in equity, it was beyond and above any attack at law which these plaintiffs could make

upon it. It is insisted that, being the sheriff's deed, it was the judgment debtor's deed, and the sheriff's recitals therein were the judgment debtor's recitals, and that, consequently, the debtor was estopped from gainsaying their truth. The position here assumed by appellant is unsound. It is not true that the sheriff's deed cannot be attacked by the judgment debtor except in equity, as numberless cases found in the reports of this state fully prove.

Mr. Freeman, in his work on Executions, section 351, in speaking as to the judgment debtor's defenses in ejectment, says: "He may certainly resist the action with success, if he can show that his interest in the property was of a character not subject to levy and sale under execution. He may also avail himself of any defect in the judgment, execution, or proceedings, of so serious a character as to render the sale void." The power of the sheriff to make the deed primarily depends upon a valid judgment and execution, and that the execution and judgment are void can always be shown by the debtor in defending against an action for possession.

It has been held that a recital of those matters in the deed is not even evidence of the fact of their existence, and that their production in evidence is absolutely necessary to support the deed, or no title is shown. Section 703 of the Code of Civil Procedure declares that, if the judgment debtor redeem, the effect of the sale is terminated, and he is restored to his estate. In this case, it is shown by oral evidence that a redemption took place. The court has so found the fact, and, the moment a redemption occurred, all interest to the realty possessed by the purchaser at the sale ceased, and the title of the judgment debtor stood as if no sale had ever ⁵⁵⁷ taken place. Such being the fact, the power of the sheriff to pass title by deed no longer existed, and any deed made by him was a nullity. It would sanction gross injustice to hold that any recital of a fact made in the deed by the sheriff would be conclusive upon the judgment debtor. Such a holding would give him authority to recite himself into a power which he in no way had, and make his deed valid when it was void at all points. It should not be held that the false recital in a sheriff's deed, that no redemption had taken place, can be binding, when at that time the sheriff was shorn of all power to make any recital, or even to make any deed. This whole question is well disposed of by Mr. Freeman at section 325 of his work upon Executions: "A deed made by an officer is merely the execution of an authority created by statute. Unless the essential conditions prescribed by statute exist, the power to execute the deed cannot be affirmed; and

an officer's deed, executed where he had no power or authority to make it, is in legal effect no deed whatever. It is absolutely void. It is impossible, owing to conflicting decisions, to say precisely what must in all cases exist to confer authority upon an officer to execute a deed. These four things may, however, beyond question, be affirmed to be indispensable—for without them a deed purporting to be made by an officer has no legal effect: There must exist a judgment and an execution, neither of which is void; the time for redemption must have expired without any redemption having been made; and the lands which the officer undertakes to convey must be situate within the territorial jurisdiction in which he is authorized to act."

For the foregoing reasons, the judgment and order are affirmed.

Harrison, J., and Van Fleet, J., concurred.

EJECTMENT—PLEADING—PLEA OR ANSWER.—Under a statute requiring the defendant in ejectment to plead the estate or license under which he holds possession, an answer by way of general denial creates no issue under which evidence of his title is admissible, and, if the plaintiff pleads and proves any legal title to the premises, he thereby establishes a *prima facie* case: *Allen v. Higgins*, 9 Wash. 446; 43 Am. St. Rep. 847, and note. See, also, the note to *Stocker v. Green*, 4 Am. St. Rep. 383.

SHERIFFS' DEEDS—CONCLUSIVENESS OF RECITALS IN.—Recitals in a sheriff's deed as to his acts are *prima facie* evidence of the facts recited: *Note to Willamette Real Estate Co. v. Hendrix*, 52 Am. St. Rep. 806. A recital in a sheriff's deed is not conclusive of the facts stated, but may be contradicted by parol evidence: *Leshey v. Gardner*, 3 Watts & S. 314; 38 Am. Dec. 764, and note. Recitals in a sheriff's deed are conclusive as between the parties to them and those claiming under them and cannot be contradicted by parol evidence showing that the land was sold under a different judgment and execution than those recited in the deed: *Zabriskie v. Meade*, 2 Nev. 285; 90 Am. Dec. 542, and note.

ELLIS v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

[118 CALIFORNIA, 612.]

INSURANCE—LIFE—WAIVER OF STATUTORY CONDITION.—A provision in a life insurance policy that no claim of loss shall be made thereunder unless proof is presented within two years after the loss matures, is a waiver of a provision in the statute under which the policy is issued and payable, requiring proof of loss within ninety days after the death of the insured.

INSURANCE—WAIVER OF STATUTORY BENEFIT.—A provision in a statute intended for the benefit of an insurer may be waived by him.

Freeman & Bates, for the appellant.

Morrison, Stratton & Foerster, for the respondent.

613 SEARLS, C. This is an action to recover upon an insurance policy issued by the defendant, a corporation, organized and existing under and by virtue of the laws of the state of Massachusetts, on the seventeenth day of December, 1878, to William H. Ellis of New Orleans, in the state of Louisiana, insuring the life of him, the said William H. Ellis, for two thousand dollars, loss payable to Leila Ellis, wife of the insured and plaintiff herein.

A demurrer was interposed to plaintiff's amended complaint based upon the ground that said complaint does not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court and judgment rendered in favor of defendant. Plaintiff appeals.

The amended complaint shows that the annual premium was payable in quarterly installments, and was paid to and including the quarterly installment which fell due September 17, 1885. Thereafter no premiums were paid.

The insured died at New Orleans, in October, 1892. In July 1894, plaintiff presented due notice and satisfactory proof of death to defendant, and defendant refused payment. Two of the provisions of the policy are as follows:

"Second. That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby **614** insured, and that, if any subsequent premium or installment of premium on this policy shall not be paid on or before the day when due, then this policy shall cease and determine, except as provided in chapter 186, Laws of the Commonwealth of Massachusetts, approved April 10, 1861, under the provisions of which law this contract is made. (A copy of this law is printed on the third page of this policy.)"

"Thirteenth. That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company at the home office in Springfield, Massachusetts, within two years after the death of the person whose life is hereby insured, and that, in accordance with the provisions of the general statutes of the commonwealth of Massachusetts, chapter 58, section 16, the time within which any suit shall be brought against the said company on any claim under this policy is hereby limited to two years from the time when the right of action accrues."

The General Statutes of Massachusetts, approved April 10, 1861, are set forth in the complaint:

Without quoting the statute at length, it is sufficient to say that the policy issued and was payable in the state of Massachusetts, and that by the statute referred to in the policy, and set out in the complaint (Mass. Laws 1861, c. 186), it is provided that no policy of insurance on life hereafter issued (after 1861) shall be forfeited or become void by the nonpayment of premium thereon, but in such cases the net value of the policy when the premium becomes due and is not paid shall be determined according to the "combined experience" or "actuaries" rate of mortality, with interest at four per cent per annum. Four-fifths of such net value, after deducting all indebtedness to the company, if any, shall be considered a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium.

⁶¹⁵ If the death of the insured occurs during the term of the insurance covered by the value of the policy as aforesaid, and if no other condition of the policy has been broken except the nonpayment of premiums, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium.

"Provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease."

It is further provided that the company may deduct from the amount due on the policy the premiums forborne and six per cent interest thereon.

The complaint shows that the net value of the policy at the date when the payment of premiums ceased constituted a sum which kept the policy alive up to December, 1895, and that the insured died in 1892.

Plaintiff further shows in apt words that she was not aware of the death of the insured until June, 1894, and that she gave notice, etc., and in July, 1894, presented proofs, etc., to defendant.

The court below held, in sustaining the demurrer, that under section 2 of chapter 186, of the Laws of the Commonwealth of Massachusetts, approved April 10, 1861, it was incumbent upon the beneficiary under the policy to give notice of the claim and proof of the death to the company within ninety days after the decease of the insured. The propriety of this ruling is the only question involved on the appeal.

Appellant's contention is, that "the defendant in its policy waived presentation of proof of death within the ninety days required by the statute of 1861."

We proceed to the consideration of the question of waiver by the defendant.

The statute of 1861 simply provides that, in case of failure to pay the annual premiums, no forfeiture shall occur by reason thereof, but treats the sums already paid, after making the deductions therein provided for, as a premium to uphold the policy so long as its amount will serve such purpose. Broadly stated, it treats the ⁶¹⁶ net value of the policy at the date of default as a cash payment of that date on account of premiums, and the policy will not be forfeited until such payment is exhausted. This is by the statute termed temporary insurance.

If the death of the insured occurs within this period of temporary insurance, and no other condition of the policy than the non-payment of premium has been violated by the insured, "the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding, provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days," together with another proviso not important here.

This requirement in reference to the time of notice and proof of death is imperative and binding upon the insured and his beneficiaries. But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law, or in a contract intended for the benefit of a party may be waived by the party to be benefited thereby.

Did the insurers waive this clause in the Massachusetts statute? We think this question should be answered in the affirmative. It inserted in its policy the following condition: "That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company at the home office in Springfield, Massachusetts, within two years after the death of the person whose life is hereby insured."

By every rule of construction in such cases the effect of this clause was to give two years after the death within which to give notice and furnish the proof of death.

If it was not intended to abrogate the proviso of the Massachusetts statute requiring such notice and proofs to be made within ninety days, then it is a snare and a delusion, well calculated to

entrap the unwary, and lull ⁶¹⁷ them into fancied security until all too late they find themselves deceived and beyond the pale of redress.

It cannot properly be said that the term of two years is given to impart notice and make proofs of death in case premiums are all paid upon the policy, and that this is a case of special insurance to which the two-year clause is not applicable, for the reasons: 1. The two-year clause is general and not limited to any particular exigency; 2. The insurance, in case of nonpayment of premiums, is only special in the sense that the policy is kept alive only so long as the net value of the policy will continue to extinguish the premiums.

The right to recover in such a case, if any, is upon the policy, and is "the same as if there had been no lapse of premium."

To say that in such a case no recovery can be had, without showing that notice and proofs of death were given within ninety days, is to beg the very question in issue, to assume there is no waiver, which is the question to be determined.

The waiver of notice and proofs within ninety days, by fixing the period at two years, stands in lieu of the ninety-day requirement, and when consummated within two years is as complete as it would have been, without the waiver, if performed within the ninety days. The defendant loses nothing by such waiver.

Under the statute, when it pays the policy it is authorized to deduct the premiums which fell due during the time the net value of such policy stood as security therefor, and extending the time to make the proofs of death will frequently have the effect of deferring the day of payment to the advantage of the insurer.

We recommend that the judgment be reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion, the ⁶¹⁸ judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

McFarland, J., Temple, J., Henshaw, J.

LIFE INSURANCE—WAIVER OF CONDITIONS.—An application for life insurance and medical examination are preliminaries solely for the benefit and protection of the insurer in issuing the policy. He may entirely dispense with or waive them and issue a policy which is valid and binding: *Malhoit v. Metropolitan etc. Ins. Co.*, 87 Me. 374; 47 Am. St. Rep. 336.

INSURANCE—LIFE—NOTICE OF DEATH.—Though a policy of insurance against accidental injury requires notice to be given in writing stating the particulars of the injury within ten days after injury or death, the failure to give such notice within the time specified does not absolve the insurer from liability if it was caused by the death of the party injured under such circumstances that it was not known until several days thereafter and the notice was given within ten days after the discovery of his body and the fact of the death: *Trippe v. Provident Fund Soc.*, 140 N. Y. 23; 37 Am. St. Rep. 529.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

GREEN v. COAST LINE RAILROAD COMPANY.

[97 GEORGIA, 15.]

MORTGAGES—NOTICE—TORT.—Notice of a mortgage is wholly without efficacy in guarding one against suffering damage by a pure tort at the hands of the mortgagor.

MORTGAGES—CORPUS—INCOME.—If income, as well as corpus, is embraced in a mortgage, the mortgagee excludes himself from all the income which accrues while he voluntarily remains out of possession. A right of possession which he declines to exercise is of no avail.

MORTGAGES — EQUITY — FORECLOSURE—INTERVENTION.—If a mortgagee has, by the terms of his mortgage, a right to take possession after default of payment, but, instead of exercising this right, leaves the mortgagor in possession, he submits himself to do equity toward any creditor of the mortgagor who may rightly intervene in the foreclosure proceedings.

MORTGAGE OF INCOME covers net income only.

RECEIVERS.—CUSTODY by a receiver is possession by the court, and is exclusive alike of both parties to the suit.

RECEIVERS—INCOME—MORTGAGED PROPERTY.—The corpus of mortgaged property, whether realty or personalty, is no less the property of the mortgagor, after it is put into the hands of a receiver, than it was before, and it remains his property until sold; and the net income made by the receiver, though embraced in the mortgage, is also the property of the mortgagor so long as it remains subject to control and application by the court, the mortgagee having absolute title to neither, but a lien upon both; if, however, the income was not in existence when the mortgage was executed, his lien, as to it, is not a legal lien, but one which gets its ultimate efficiency from equity, through the doctrine either of equitable assignment or equitable estoppel.

RECEIVERS—PRIORITY OF CLAIM FOR TORT OVER MORTGAGE—INSOLVENT RAILWAY CORPORATION.—A mortgage upon the property of a railway company, the mortgagor being left in possession, is, upon the company's insolvency, and as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponed, in equity,

in favor of a claim for damages resulting from a tort committed by the company in operating its road, after the execution of the mortgage, but before the appointment of the receiver.

RECEIVERS—PRIORITY OF CLAIM FOR DAMAGES OVER MORTGAGE—INSOLVENT RAILWAY CORPORATION—INCOME.—If a railroad company has mortgaged its property, including income, and a person recovers a judgment for damages caused by the negligence of the company, in operating its road before a receiver is appointed and proceedings to foreclose the mortgage are instituted against the company, which has become insolvent, the judgment, so far as the income is concerned, has priority over the mortgage; and income cannot be diverted from the payment of the judgment by the receiver's applying a portion of it to betterments, and the court's applying another portion of it to fees of the receiver and his counsel, while the case is in progress, where this is all the fund there is in court for distribution, and where the mortgage is more than sufficient to exhaust it, as this would incidentally allow the mortgagee to profit by this income to the detriment of the judgment creditor.

Exceptions to master's report.

R. R. Richards, Charlton, Mackall & Anderson, and W. R. Leaken, for the plaintiff in error.

G. A. Mercer & Son and Saussy & Saussy, for the defendant in error.

¹⁶ SIMMONS, C. J. At my request, concurred in by my associates, ex-Chief Justice Bleckley has assisted the court both in deciding this case and in preparing the opinion. After adoption by the full court, it now appears in his language.

¹⁷ The Coast Line Railroad Company executed to trustees two mortgages in the form of trust deeds, the first dated September 1, 1874, and the second May 1, 1876. The former was made to secure the payment of bonds amounting to \$25,000, maturing September 1, 1894, issued by the company to raise a fund for use in the construction of a portion of its railway; the latter to secure bonds of the company amounting to \$32,000, maturing May 1, 1886, issued to liquidate the floating debt of the company. Both mortgages covered the franchises, present and prospective, and all the property, real and personal, of the company, both acquired and to be acquired, including expressly all "tolls, income, rents, issues, and profits," accruing after any default made in the payment of the bonds themselves or of any interest due thereon. All the bonds bore interest from date, payable semi-annually.

The Coast Line Railroad Company had its origin as a corporation under the name of the Wilmington Railroad Company: Acts 1868, p. 114. For change of name, see Acts 1872, p. 375. "Power to borrow not exceeding \$25,000, current and lawful money, and issue bonds for the payment of the same," was conferred upon a

majority of the directors by an amendment to the charter: Acts 1874, p. 312. The first mortgage was made to secure these bonds, and there was no statutory authority for making it, except the general provision relating to mortgages contained in section 1954 of the code, which reads as follows: "A mortgage in this state is only a security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods, or other things in bulk but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches on the purchases made to supply their place." Before the second mortgage was executed, power was conferred upon the company to issue bonds, not to exceed the ¹⁸ sum of \$250,000, "secured by mortgage upon the whole or any portion of the property of the company": Acts 1876, p. 258. Though the act of February 29, 1876 (Acts 1876, p. 118), which now forms sections 1689v to 1689y of the code, was in existence when the second mortgage was executed, it has no application to that mortgage, for the reason that this act relates only to railroad corporations formed by the purchasers of railroads in the mode pointed out by the provisions of the act.

The company made default as to the principal, as well as interest, on the second mortgage bonds in 1886, and as to the interest on the first mortgage bonds in March, 1890, and has continued thus in default ever since.

On the 30th of April, 1890, a train, when running upon the railway of the company by steam power, ran against or over the husband and also a son of Mrs. Green, killing them both; and on July 17, 1890, she recovered against the company, in the city court of Savannah, \$1,750, as her damages for this tort. The Messrs. Green, at the time of the homicide, were not employes of the company, or, so far as appears, under any contract relation to it, or with it, but were simply members of the general public, passing on foot along a sidewalk adjacent to the railway track.

According to express provision of the mortgage deeds, the trustees could, when the default of the company in paying principal or interest due on any of the bonds had continued for sixty days, have entered into possession and operated the railway, or could have instituted legal or equitable proceedings to foreclose; but neither of these steps was taken until after judgment in favor of Mrs. Green was rendered, nor until October 25, 1890, when a petition by the only trustee then in office and by one of the bondholders (the latter owning all the second mortgage bonds and

most of the others) was filed in Chatham superior court to foreclose the mortgages and for the appointment of a receiver. This bondholder coplaintiff was president of the railroad ¹⁰ company at the time of bringing this suit, and had been so continuously since the year 1883 or 1884. A receiver was appointed on November 7th thereafter, and the company turned over to him all of its property, including \$225.04 in cash. Among the expenditures of the receiver, reported by him August 6, 1892, was an item of \$2,349.88 for steel rails, iron, and cross-ties, which he had purchased and used in improving the property; and the net earnings for distribution reported by him amounted to \$2,327.22. The corpus of the property, when sold on July 5, 1892, produced \$75,000, none of which was expended by the receiver.

Pending the cause in Chatham superior court, Mrs. Green filed her intervention claiming payment out of the fund under the control of the court. There was a reference to a master in August, 1891, and the master reported in April, 1893, and again by supplemental report in March, 1894. The master disallowed Mrs. Green's claim as one having priority over the mortgages, ranking it as inferior to them, both as to corpus and income, and she filed exceptions to his reports, which exceptions the court overruled on July 9, 1894, and approved both reports of the master. The verdict of a jury was rendered on August 3, 1894, in conformity with the master's report, and on the next day exceptions pendente lite were filed by Mrs. Green complaining of error committed by the court in overruling her exceptions and in approving the reports. Afterward, on the same day, the court decreed finally in favor of the priority of the mortgages; and by bill of exceptions certified September 1, 1894, Mrs. Green brought the case to this court, assigning error on the decree and on the matters embraced in her exceptions pendente lite.

Pending the case before the master, and on the same day of the receiver's last report, to wit, August 6, 1892, the court ordered the receiver's counsel to be paid, \$1,000 ²⁰ of income; and on December 17, 1892, ordered the receiver himself to be paid a like sum out of the income.

Assuming both mortgages to be good and valid, and conceding their priority over Mrs. Green's judgment as to the corpus of the property mortgaged, two general questions arise for our determination, which are: 1. Had they a like priority in respect to the income; and 2. If they had not, but the priority as to it was with the judgment, whether the application of a portion of the income to betterments, made by the receiver while

he was in charge of the railroad and operating it, and of another portion, made by the court, to the payment of the receiver's counsel, and to the receiver himself while the case was pending before the master in chancery, would defeat Mrs. Green's claim altogether, in so far as the fund derived from income has thus been exhausted, or whether that fund, so far as may be necessary to pay her judgment, should be reimbursed out of the fund produced by the sale of the corpus, and which was still under the control of the court at the time the final decree was rendered. Upon both principal and authority, the second question is, under the special facts of this case, so clear that it may be left to stand on the head-notes. The first question alone needs discussion in this opinion.

The first mortgage was fourteen and the second twelve years old when the corporation, while in possession and operating the railroad, committed the negligent tort for which Mrs. Green recovered her judgment. At that time, some of the interest on the first mortgage bonds was overdue and unpaid, and all the principal and some of the interest of the second mortgage bonds had been due and unpaid upward of three years. So far as appears, the corporation had no contract relation whatever with Mrs. Green or any of her family. Her judgment against the corporation for her damages was rendered two months and seventeen days after the cause of action arose. The petition in the foreclosure proceeding was filed five months and twenty-five days ²¹ after the double homicide was committed, and three months and eight days after judgment for the damages was rendered in the city court. Thirteen days later a receiver was appointed. It was not alleged that any demand upon the corporation had been made for possession of the mortgaged property, nor did the petitioners invoke the aid of the court to put them, or either of them, into possession so as to enable them to operate the railway and receive the income under the power contained in the mortgage deeds.

The fair presumption is, that the money turned over to the receiver by the corporation was a remnant of income earned and collected by the corporation, nothing to the contrary appearing. The receiver's operations resulted in a net income over operating expenses large enough (when swelled by what he expended for steel rails, iron, and cross-ties used by him to improve the railway before it was sold out) to discharge the judgment and leave about fifty per cent of the income fund to be applied to the expenses of the receivership, other than current operating expenses. The corpus of the mortgaged property sold for \$75,000, considerably

more than the principal of the bonds, but not enough, even with the income fund added, to pay off the bonds, interest as well as principal. No doubt exists that the company is insolvent, and nothing in sight indicates that Mrs. Green will or ever can realize one cent for her damages, unless she gets it by being allowed priority over the mortgages as to the income made by the receiver and the remnant of cash turned over to him with the railway, etc., when he entered into possession as receiver.

Each of these contestants had notice of how the corporation stood in relation to the other. The charter was the medium of notice to the mortgagee; the mortgages, together with the due recording of them, were notice to Mrs. Green. But of what avail was notice to her? The purpose of notice is to warn the notified not to deal or trust save in subordination to the right to which the notice relates. ²² Mortgagee, lender of money, or purchaser of bonds could profit by notice, but notice of a mortgage is wholly without efficacy in guarding one against suffering damage by a pure tort at the hands of the mortgagor. The observation of Mr. Justice Brewer in *Kneeland v. American Loan Co.*, 136 U. S. 97, 98, repeated by Mr. Justice Shiras in *Thomas v. Western Car Co.*, 149 U. S. 111, has no application to Mrs. Green; that observation being as follows: "No one is bound to sell to a railroad company or to work for it; and whoever has dealings with the company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of mortgage liens."

Unless a mortgage upon property be also upon the income, a mortgagee out of possession has no claim or lien upon income: *Teal v. Walker*, 111 U. S. 242. This is true in Georgia, although the income accrue from the property while in the hands of a receiver: *Vason v. Ball*, 56 Ga. 268. Where income as well as corpus is embraced in the mortgage, the mortgagee excludes himself from all the income which accrues while he voluntarily remains out of possession. A right of possession which he declines to exercise is of no avail: *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Illinois etc. Tel. Co.*, 91 U. S. 603; *American Bridge Co. v. Heidelberg*, 94 U. S. 798.

Where the mortgagee has by the terms of the mortgage a right to take possession after default of payment, make income and appropriate the same to his debt, and he elects not to do so, but to apply for a receiver by an equitable petition to foreclose the mortgage and bring the property to sale, and, pending the suit, to make

income through the receiver, he has not the same strict right to the income made by the receiver that he would have to income made by himself as mortgagee in possession. Custody by a receiver is possession by the court, and is exclusive alike of both parties to the suit. Undoubtedly, a court of equity may treat income ²³ made by itself through a receiver as legally its own, held in trust for the beneficiary best entitled to it. The mortgagee is still out of possession, and, where he has neither demanded it nor applied to a court for aid in obtaining it, he is out by his own voluntary election. The court may, and where it finally decrees in his favor on the merits generally will, consider its own possession as substituted for the one to which he was entitled, and as attended with the same incidents touching net income; but the court is not absolutely bound to dispose of this income just as the mortgagee would have a right to apply it had it accrued from the mortgaged property while in his possession and under his own management. On the contrary, the court may consider and give effect to equities concerning it which the mortgagee might safely ignore or defy were he not a voluntary suitor for equitable relief. The corpus of the mortgaged property, whether realty or personalty, is no less the property of the mortgagor after it is put into the hands of a receiver than it was before, and in Georgia it remains his property until actually sold; not even foreclosure and decree of sale will terminate or divest his title. In practice we have nothing corresponding to a strict foreclosure in England. The net income made by the receiver, though embraced in the mortgage, is also the property of the mortgagor so long as it remains subject to control and application by the court, the mortgagee having absolute title to neither, but a lien upon both; but this income not having been in existence when the mortgage was executed, his lien, as to it, is not a legal lien, pure and simple, but one which gets its ultimate efficiency from equity through the doctrine either of equitable assignment or equitable estoppel: Jones on Chattel Mortgages, secs. 170-175; 1 Jones on Mortgages, 5th. ed., sec. 149, et seq.; 1 Pingree on Mortgages, sec. 453, et seq. Mortgage of income covers net income only: Jones on Corporate Bonds and Mortgages, secs. 80-90; 1 Pingree on Mortgages, sec. 461; 1 Jones on Mortgages, sec. 160; Fosdick v. Schall, 99 U. S. 252.

In equity, however it might be at law, it makes no substantial ²⁴ difference that these mortgages are trust deeds in form and convey absolutely; they ought, in this forum and on such a question of priority as that now before us, to be considered as mort-

gages pure and simple. So considered they pass no title but are only securities for debts: Code, sec. 1954.

With the trust deeds reduced in equity to the rank of mortgages, this is not a case in which one competing creditor has a legal lien and the other has none, for in Georgia a judgment lien attaches upon property previously mortgaged as well as upon any not so encumbered. "All judgments obtained in the superior, justices', or other courts of this state shall be of equal dignity, and shall bind all the property of the defendant, both real and personal, from the date of such judgment, except as otherwise provided in this code": Code, sec. 3580. "A future interest in personalty cannot be seized and sold, but the lien of judgments will attach thereto, so far as to prevent alienation before the right to present possession accrues": Code, sec. 2625. A judgment against a railroad corporation binds all its property, including its franchises, except only its franchise to be a corporation: *Atlanta v. Grant*, 57 Ga. 340. The lien of Mrs. Green's judgment covers net income made by the receiver as fully as does that of the mortgages, and, being statutory, it needs no aid from equity or equitable principles to render it a complete legal lien on income. Ought equity to afford aid to postpone or defeat it under the facts of the present case?

Without reducing the trust deeds to the rank of mortgages, how would the matter stand? In that case, the mortgagee would take the legal title of the whole railroad property, the franchises included, and relatively to the public would stand as owner, for the time being; and, since franchise and duty are inseparable, would be liable directly and primarily for the damages occasioned by the tort. To treat the deeds as mortgages is thus a favor rather than a disadvantage ²⁵ to the mortgagee and the bondholders he represents.

If it be said that as railroad property is peculiar, a mortgage upon it should, if the terms of the mortgage be sufficiently comprehensive, be construed to bind both future acquired corpus and future accrued income, at law, then we answer that, because of this very peculiarity, the income so bound should, in a court of equity, be limited strictly to the surplus after satisfying all damages to the public occasioned by using the franchises, whether such use was by the mortgagor or the receiver. If it be said that by filing the petition to foreclose, or by actual seizure of the property through a receiver, a lien upon income arose, or the mortgage lien was aided, then the reply is, that this was after the judgment lien of Mrs. Green attached on corpus and was ready to attach on

income as it accrued, and so the equity of the judgment is as much aided by its legal lien as the equity of the mortgage is aided by filing the petition or by actual seizure.

These joint plaintiffs, after describing Mrs. Green's judgment and other judgments, inserted an appeal to the heart of equity as follows: "And your petitioners show that as yet no active measures have been taken by the holders of said judgments to enforce the same, but that they have threatened and still threaten to levy the same upon the property of said defendant corporation and to sell out said railroad and its franchises; and petitioners show that any such levy and procedure must result in serious sacrifice, not only to said road, but to the holders of its lien securities, and that no proper adjustment and settlement of said various demands can be made except through the action of this court by the enforcement to intervene and assert their rights in this suit. Your petitioners this proceeding afford and offer to said judgment creditors, and to all other parties having legal demands against said defendant, full opportunity to intervene and to assert their claims; but ²⁶ petitioners pray that in the event that either of said judgment creditors or any other creditor shall make any levy upon the property of said defendant, or otherwise proceed against the same, the court will at once, and from time to time as may be required, issue its writ of injunction against said party or parties, restraining all further proceedings by separate suits and compelling said parties to intervene and assert their right in this suit. Your petitioners show that they are remediless under the strict rules of the common law, and can obtain adequate and sufficient relief only through equitable principles and methods to be administered by this court."

Who are those who made this appeal to equity and invoked the remedy and rules of equitable relief? The surviving mortgagee and one of his wards under the trust of the mortgages; this ward, by virtue of owning all the bonds of the second issue and most of those of the first issue, joined in the petition as coplaintiff, being, moreover, president of the railroad corporation at the time of filing the petition, and having been so when Mrs. Green was made a widow-mother and when she obtained her judgment, and for many years before, even when the first default of the corporation occurred.

As equity applies estoppel in aid of mortgages on future acquisitions, whether of corpus or income, it certainly might apply a like doctrine in aid of a judgment recovered by a wife and mother for homicidal negligence by a railway corporation which happen-

ed when one of the plaintiffs and the chief beneficiary of the suit was president of the derelict institution. Would it be harsh to say to him in answer to his appeal: "Sir, if you had desired your bonds and coupons to have a sweeping and unlimited preference over a judgment for damages occasioned by negligent homicide, you ought to have seen to it that the injury causing the damages was not inflicted. You were in control, whereas this wife and mother had no control, and nothing ²⁷ to do with the management. It would be far better to impute the negligence of the corporation to you, its president, than it would be to turn her away empty that your coffers may be made a little more full." We do not propose, however, to rest the case on a ground so narrow, or on any which does not apply alike to all the bondholders.

It is of much importance to the wider and true ground that the income in question was made by exercising the franchises granted by the state to the railroad company, a corporation of a quasi public nature. Such corporations incur certain duties and obligations to the public which adhere firmly to the franchises granted, and cannot be separated from them without legislative consent: *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 355; 15 Am. Rep. 678; and cases cited; *Chattanooga etc. R. R. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169; *Central R. R. etc. Co. v. Phinazee*, 93 Ga. 488. These duties and obligations, equally with the franchises themselves, are matters of fundamental contract between the corporation and the sovereignty creating it, a contract which is paramount to all subsequent contracts which the corporation is capable of entering into with any person or for any purpose. By necessary implication, these latter contracts are always qualified and held in check by the former, and in every conflict they must be subordinated to it. The corporation can grant to others no immunity as to its franchises which it could not claim for itself, nor can it, in behalf of its creditors, or any of them, free the franchises from being answerable out of the revenue produced by their exercise, for torts committed in the use of them, whether such torts be committed by the corporation itself or by others using the franchises with its consent or by its permission. It is by reason of this firm adhesion of duty imposed to franchise granted that an incorporated railroad company cannot lease its line of railway and permit it to be operated by the lessee without being liable for negligent torts committed by the lessee to the same extent as if they ²⁸ were committed by itself: See authorities cited in 2 Cook on Stock and Stockholders, 3d ed., sec. 906; 3 Wood on Railways, Minor's ed., 1893, secs. 489, 490. And this rigid rule

of liability, which is directly the opposite of that which prevails touching leases where no charter franchises of a quasi public nature are involved, is not relaxed in favor of a company having express permission from the legislature to make the lease, unless there be also an express exemption or grant of absolution from liability: *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464; 48 Am. Rep. 574.

Thus, in the case of a mere permissive lease of a railroad, there is cumulative rather than diminished security to the injured citizen, who, for a tort committed upon or against him by the lessee, in the exercise of franchises derived from the lessor, can hold either or both answerable for the damages. The essential reason on which the adjudged cases respecting the lease of railroads is founded is broad enough to extend and apply to mortgages, at least in so far as mortgages are designed to encumber future income. After a railroad company has mortgaged all its line, constructed and to be constructed, all its motive power and rolling stock, all its stations and depots, all its franchises acquired and to be acquired, and all its future income save that which may accrue before it defaults on any of the mortgage debt, what besides this excepted income, supposing the mortgage to be valid and enforced as written, is left from which to make satisfaction for torts committed by the company during the indefinite time which it may be the interest or the pleasure of the mortgagee to stay out of possession and leave the company in? By chance there may be a surplus left from the proceeds of the corpus or from income, or from both, after the discharge of the mortgage, but by an equal chance there may be none, and by still another chance a large deficiency may be the outcome. It is and has long been matter of common knowledge and general information which of these chances is most likely in any given instance ²⁰ to be converted into certainty, become realized as a fact of experience, and take its place in history. It would seem reasonable that, relatively to negligent torts by whomsoever committed in the use of the charter franchises, the mortgagee of a railroad should, under the rule of public policy applicable to this kind of property and constantly applied to it in respect to leases, be regarded either as owner or as holding his encumbrance in subjection to the duties and obligations resting upon the owner and so interwoven with the franchises as to be inseparable from them otherwise than by express statute. Regarding him in either light, he could not equitably appropriate to his mortgage debt income earned by the mortgagor or by a receiver, and leave a sufferer from such a tort uncompen-

sated and without redress. If treated as owner, he would himself be liable, in the first instance, for the damages occasioned by the tort; and if treated as holding his mortgage lien in subjection to the charter burdens imposed on the mortgagor, the least that he could justly do would be to stand aside as to so much of the income as might be necessary to right the wrong done by the tort. Can these charter burdens, or any of them, be evaded by creating the relation of debtor and creditor with or without the relation of mortgagor or mortgagee, superadded, any more than by creating the relation of lessor and lessee? Of what avail to the public would be the mere personal liability of a corporation with all its substantial assets bound hard and fast by mortgage, the mortgagor remaining in possession and continuing to exercise all the corporate franchises? Can the whole of the corporate assets, including these franchises and the fruits of their exercise, be impounded by a mortgage contract or any other, and put in a bomb-proof for ten, twenty, fifty, or a hundred years, the term of credit, and for any period of indulgence or forbearance thereafter which the mortgagee may choose to grant?

It is manifest that the distinction between general and special creditors, or between general liens and specific liens, ³⁰ is only nominally involved; or, if really involved, is favorable to the involuntary creditor, made so by tort, rather than to the voluntary creditor by mortgage, where these two creditors are the contestants over income and where the mortgagor is a railroad corporation and the mortgage covers all its effects, real and personal, present and future. The lien of such a mortgage, when aided by the doctrine of equitable assignment and estoppel as to corpus acquired and income produced after its execution, is as comprehensive, and therefore as general, as the lien of a judgment based on the tort is or could be. In such a case, the liens are equally general, for the voluntary creditor did not extend credit or take security merely upon some particular property of his debtor, but upon all he had or might ever get. And what specializes the involuntary creditor, or tends to specialize him with pathetic emphasis, is, that he did not extend credit at all, but was forced to become a creditor against his will and without any security whatever, save that afforded him as one of the general public by the charter of the wrongdoer. One creditor who, by any contract whatever, secures himself on all his debtor's effects, all the present and all the future, without limit of time, has no claim to be considered as a special creditor, and is not entitled to any favor whatever in a court of equity beyond what the rules of inexorable law entitle

him to demand, as against damages for a tort committed by the debtor to a stranger, whether pending the term of credit or after it expired. The reason why specific liens prevail over general legal liens is, that there is something left, or possible to be left, for the latter after the property covered by the former is all absorbed. A special lien is a lien upon particular property. If a lien extends to everything, acquired and to be acquired, it is not special merely because it was created by mortgage or other express contract. Relatively to income, the judgment of Mrs. Green is far better entitled in equity to the status of a special lien or charge than are these mortgages. The ³¹ plaintiff in that judgment is a creditor by compulsion, as was the damaged creditor in *Central Trust Co. v. Thurman*, 94 Ga. 735, where the damage resulted to a tract of land by reason of taking part of the tract for right of way. The strong equity on the side of the involuntary creditor is too obvious to escape the discernment of a child, and the question comes down to this: whether the law as administered by courts of equity will, on the ground of public policy, in view of the paramount rank of charter duties involving public safety, give effect to this equity on income made by a receiver, when it is supported by a junior legal lien—the lien of a general judgment for the assessed damages.

Duty is inherent in franchise, adheres to it, and, as we have seen, cannot be separated from it without express enactment. It would be far more rational to subject the corpus, especially the corpus of the franchises, than to exempt income. The present case, however, calls for nothing beyond subjection of the latter. It is like stopping on the freight earned by the voyage and sparing the ship. Benefit and burden are correlatives, and he who would appropriate all a debtor has must adopt such of his burdens as are fundamental to his debtor's right to have existence and create any debt or incur any obligation whatsoever. Burden equals benefit as a ground of equitable preference; and the loss by reason of the debtor's insolvency it to be borne by the creditor who would have been ultimately benefited if no loss had occurred, or if the loss occasioned by failure of the debtor in his duty had been a gain instead of a loss.

Like the electric current, preference or special priority of payment has, in reference to a "going concern" of a quasi public nature, two opposite poles. Any adjudication must be wrong which, overlooking this, treats it as having but one. The positive pole is benefit, public and private—benefit to all and benefit to the individual, one of the necessary individuals to be benefited being

the holder of the ³² encumbrance which would rank first were there no special priority to be considered. The negative pole is burden, burden like that of diligence imposed by public policy for public benefit, for the interest of all, but, in the nature of things, any disregard of it not benefiting but tending to injure the individual who would otherwise be and remain the favorite. Upon him it falls incidentally as a loss by misfortune, just as a failure in duty by others often affects us, and our failure in a like duty as often affects them. A doctrine of preference based exclusively on benefit would pay preferentially for feeding the winning horse, for riding him and even for whipping and urging him on to the goal, for making him go and keeping him a "going concern," but not for damage done to a person run over in the race in consequence of negligence by or attributable to the owner. Maritime law, which is more conversant with "going concerns" on a large scale than any other branch of law, because it has dealt with them longest, would discriminate, not against the claimant for damages, but in his favor: 14 Am. & Eng. Ency. of Law, 443; 16 Am. & Eng. Ency. of Law, 358; *Force v. Pride of the Ocean*, 3 Fed. Rep. 162; *The John G. Stevens*, 40 Fed. Rep. 331. In building up and developing a system of liens applicable to supplies, repairs, advances, wages, pilotage, towage, wharfage, salvage, damages by tort, etc., it has put damages by tort at or near the head of the list, and the reason for doing so is one of public policy—the encouragement of safe navigation; a reason no less applicable to railways extending along or across public thoroughfares than to ships or steamers on the ocean, seas, or rivers, collision by cars or trains of cars with persons or property on land being as probable and frequently as hurtful as like collisions by vessels on water. Peril to person and property has shaped public policy with reference to marine torts, and that element exerts, and ought to exert, a chief influence in shaping it with reference to torts by railroads. Equity, like other divisions of jurisprudence, takes notice ³³ of public policy, promotes it and conforms to it: 1 Spence's Equity Jurisdiction, 427, and note. Indeed, the great equity maxim, "Once a mortgage always a mortgage," is based upon it: 1 Spence's Equity Jurisdiction, 599-603.

If it be said that in maritime law torts by a ship are attended with a lien on the ship for the damages, and that in equity no lien arises out of torts by a railroad company, the answer is, that though this is true, torts by the latter, as against a mortgagee of the franchises, are attended by an equity in behalf of the injured party as strong as that on which the ranking of the maritime lien

for damages is founded. No one can doubt that relative strength of equities has been a ruling consideration in fixing the priority of the various maritime liens as compared one with another. In so far as limiting the recovery for maritime torts to the value of the ship has influenced that priority, a like limitation arising out of the actual facts of the situation exists as to the assets of a railroad corporation; not, indeed, a limitation upon the right of recovery for torts committed by such a corporation, but upon the possibility of realizing the recovery, where not only the franchises and income of the railroad are mortgaged, but all other effects of the corporation, and where the corporation, after making the mortgage and committing the tort, proves insolvent. Whenever an equity is treated as a lien, it is so treated for the purpose of rendering it effectual to take and hold money, not merely to base an action upon; and any equitable right of payment which courts of equity will enforce as against some previous encumbrance competing with it for payment out of the given fund is virtually an equitable lien, whether called a lien or a "preferential claim." A maritime lien for damages is a legal, not an equitable, lien, though doubtless it got its rank, if not its existence, from the strong inherent equity of holding a ship answerable for injuries done by its instrumentality, no matter who was on board, or to whom it belonged, or who had mortgages or ³⁴ other liens, maritime or nonmaritime, upon it, and no matter whether the wrong was done or the seizure for it was made on the high seas or in a home port or a foreign port. Indeed, though the lien owed its origin to public policy, this very equity underlay that policy, and thus was the ultimate ground of the lien, both with reference to its existence and its rank.

"The feather that adorns the royal bird supports him in his flight; strip him of his plumes, and you fix him to the earth." This language was applied to the highest corporate being in a monarchy—the king. But the bird may well stand for a subordinate corporation, especially when it exists only to move persons and property from place to place, as does a railroad corporation, and whose wings consist of chartered franchises, as real instruments of locomotion (though immaterial) as the pinions of a bird or the sails of a ship. No chartered railroad could be "a going concern" save for its franchises; and by the use of these, to hurl locomotives, cars, or trains against persons or property, to their injury or destruction, is no less violative of public security and public policy than, by the use of sails or steam, to run one vessel against another on the high seas. The same policy which, irre-

spective of mortgages and other prior liens, holds the vessel to answer for the damages in the latter case, might well hold the railroad, more especially the franchises and their produce, to answer for the damages in the former case.

Salus populi suprema lex is a cardinal maxim. It is the whole gospel of public policy condensed in a single text. The safety of the people is the supreme law; the good of the public first and before everything else. On the benefit side, the good of the public and the good of the mortgagee of a railroad coincide. Because of this, courts of high authority hold that supplies or services essential to keep a railroad in operation and enable it to answer the ends of its creation may become a charge upon income made by a receiver ³⁵ subsequently appointed. The consequence of so charging income may be made to affect the mortgagee irrespective of his consent. People may, by procurement of the mortgagor in possession, volunteer to benefit the mortgagee, and, if they succeed, may claim reimbursement or just compensation out of income. In the civil law, there was something slightly analogous. A person who volunteered to act, and did act, without authority, in the affairs of another, during his absence, was called by that law negotiorum gestor, meaning a manager of business. The duty of reimbursing, but not of rewarding, him was enforced if his action proved beneficial to the absentee. Though an intermeddler, he was not forced to suffer in consequence of his useful officiousness, but was not allowed to profit by it. The principle is, at bottom, the principle of salvage. In maritime law, it has its literal and most striking application to services rendered in saving ships from threatened destruction. The right to volunteer assistance without being called on or employed to render it springs up out of urgency—the urgency of the occasion. Peril and emergency serve as a letter of credit, and as a pledge of the endangered property as security for payment. Whoever is present at the scene of the threatened disaster may interfere, avert calamity, and save the ship. Toned down and shaded off for business attended with less hazard, this principle of salvage is also applicable when only moderate perils are involved—perils which in no way threaten destruction, and some of them not to the ship itself at all, but only to the voyage or its speedy and successful accomplishment. Thus, for needful supplies furnished, or repairs made, etc., maritime law renders the ship liable and raises a lien upon it to secure the debt. So rational and comprehensive is the principle, that we find it, in a modified form, prevailing to some extent in the common law, as is shown, for instance, in the frequent and fami-

liar example of necessities furnished to a wife or child under certain conditions, without the consent, ³⁶ or even against the declared wish, of the husband or father. The law holds him liable to pay for them, provided they were proper in kind, quality, and quantity, and necessary to keep the woman or the infant "a going concern." We have a case in which the principle was applied in equity to a policy of insurance, where a stranger furnished money to pay installments of premium when, if not paid, the policy would have lapsed and become lost to the beneficiary: *Hodge v. Ellis*, 76 Ga. 272. The stranger was allowed not only to be reimbursed his advances, but to share in the fruits of the salvage. In the case of *Raoul v. Newman*, 59 Ga. 410, Raoul was the station agent, at Macon, of the Central Railroad, and Newman was a physician. A negro boy, thirteen or fourteen years of age, was severely injured on the track in the yard of the company's warehouse. The father of the child was absent, and Raoul called in Newman as a physician. Services were rendered and charged to Raoul. This court held that if there was a great and overwhelming calamity to the child, rendering medical aid instantly necessary, the parent would be responsible as for necessities, and Raoul would be treated as his agent to call the physician.

The principle of benefit is salvage, in a wide and comprehensive sense, and the principle of burden, on the other hand, is the inseparability of fundamental charter duties from charter franchises. The discharge of these duties is a burden laid upon railroad corporations by the law of their existence. Performance of them is attended with benefit both to the public and to mortgagees, and their violation tends to the injury of both. In so far as redress for violation can be made from the fruits of the franchises, the produce or income of their exercise, it is manifestly more just that this redress should go to a wrong and maltreated stranger than to a mortgagee, even though they be alike blameless. The mortgagee is in privity, a voluntary privity, with the corporation; the stranger is not.

Every direct authority known to us is against us; nevertheless, ³⁷ we are right and these authorities are all wrong, as time and further judicial study of the subject will manifest. The mistake made by courts and judges has been that they treat the problem of preferential debts as having but one pole, the affirmative pole of benefit, ignoring the negative pole of burden altogether. It may be that several of the cases seemingly adverse to us were decided correctly on the facts involved in them, but the spirit and reasoning of all the cases are viciously narrow and unsound.

There seems to be a theory that if mortgaged railroads can be kept "going concerns," it matters not what else may stop. That the public is decidedly the most important "going concern" in existence appears to be overlooked. As a part of the public, the husband and the son of Mrs. Green were "going concerns," and the going of this railroad was the cause of their ceasing to be such. The cases on which we are animadverting would treat as a preferential debt a claim for the coal or wood consumed in generating the steam which killed them, but would deny any preference whatever to a judgment for damages resulting from the homicide. Public policy certainly favors keeping the franchises active, but it favors more the security of all who as a part of the public are liable to suffer by their activity. No policy is subserved by going wrong. Nonfeasance is better than misfeasance; idleness is better than homicidal mischief resulting from a vicious or negligent activity.

Two of the most important and best considered cases which lie in our path are *Hiles v. Case*, 14 Fed. Rep. 141, and *St. Louis Trust Co. v. Riley*, 70 Fed. Rep. 32. In the first there were several intervenors who wanted damages for burning their timber and cranberry marsh. The fire resulted from sparks escaping from locomotives, upward of four months before the receiver was appointed. In a brief, clear, and admirable opinion, except that it fights on the wrong side, if not of the case, certainly of the question discussed, Judge Dyer, of the eastern district of Wisconsin, ³⁸ proceeds to fire the intervenors from his court by a volley of judicial sparks, thus:

"To sustain the claims in question, it is therefore necessary that some equity be found in favor of the petitioners, and superior to that of the bondholders, upon which to base their allowance; and the supposed equity is, that the fire in question occurred after default on the part of the railroad company in payment of the mortgage debt or interest; that thereafter the company operated the road as the agent or trustee in equity of the bondholders, and that the alleged liability sought to be enforced in the present proceeding arose from such operation of the road, and as an incident thereto; that therefore it may be put under the head of operating expenses, and so acquire rank as a claim enforceable against the earnings of the road in the hands of the receiver. There is some plausibility in the argument, but it is unsound. No relation of principal or agent, either in law or equity, can be implied from the mere fact that the railroad company continued to operate the road after it was in default in payment of the mortgage

debt, nor from the further fact that the bondholders did not take possession of the property after such default, nor from both facts combined. The mortgages gave to the mortgagees the right to take possession after default, but they were not obliged to do so, nor was it necessary that they should take possession in order to avoid such a liability as is here claimed. The railroad company was operating the road when the alleged loss and damage occurred. The negligence of the company, if there was negligence at all, occasioned the loss. For that negligence it alone was responsible. To sustain the position taken by the petitioners it must be held that the bondholders at least impliedly assumed liability for the negligence of the railroad company, and that, by operation of law, this mortgage security was subordinated to claims of the character of these. I cannot so hold. The alleged cause of action accrued after the company had given mortgages ³⁰ upon all its property, which were then subsisting liens, and before the receiver was appointed. It can make no difference that they accrued after the company was in default of payment of interest on its bonds. The road was still being operated by the company, and whatever liability existed must have been one against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which the court sometimes orders paid from net earnings in the hands of a receiver, as presenting equities superior to those of bondholders.

"If such claims as are here in question could be allowed, there would seem hardly to be a limit to the allowance of demands which it might be as forcibly argued were superior in their equities to those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing, and perhaps destroying, an otherwise valuable security."

The other case, *St. Louis Trust Co. v. Riley*, 70 Fed. Rep. 32, was decided as late as September 30, 1895, only a few days before our judgment in the present case was announced. Its existence was unknown to us until after that time. A very able court decided it, the circuit court of appeals for the eighth circuit, the members of the court presiding being Circuit Judges Caldwell, Sanborn, and Thayer. The opinion was written by Judge Sanborn. The intervenor rested his case on a judgment recovered for a personal injury, and the question considered was, "Is a claim

for damages caused by the negligence of a street railway company, a mortgagor, five months before a receiver was appointed in a suit to foreclose a mortgage upon its property and income, entitled to be preferred to the mortgage debt in payment ⁴⁰ out of the earnings of the railroad during the receivership?" The decision was in the negative, for the usual reason, namely, that the claimant had not benefited the mortgagee or the bondholders by suffering wrongful hurt to himself at the hands of the railway company. Seventeen cases decided by the supreme court of the United States, not one of them involving tort prior to the appointment of a receiver, are cited and reviewed in the opinion, after which it proceeds thus:

"From this brief review of the decisions of the supreme court bearing upon this question, we think these propositions may be deduced: 1. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property; 2. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor, which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee; 3. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the divested fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims ⁴¹ in preference to the mortgage debt; . . . or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad and keep it a going concern. It is indispensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence the wages of employés, who might otherwise cease from their work, the amounts due to connecting lines of

railroad that might otherwise cease their business relations with the managers of the mortgaged property, and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the proceeds of the sale of the mortgaged property, in preference to the mortgage debt. . . . But a claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances, and supplies produce or increase income, and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances, and claims for material and supplies accrue under and pursuant to the contract between the mortgagor and mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract, and for a breach of the duty of the mortgagor to operate the railroad carefully. Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but, if repeated and continued, would inevitably stop it. It was not necessary, but was deleterious to its operation. For ⁴² these reasons, this claim for damages cannot, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers."

Courts which thus reason and decide may possibly be reached by the late discovery of Professor Roentgen, and for their benefit and the benefit of the profession generally, we shall close this opinion with appropriate illustrations, based on the new process.

Judge Seymour D. Thompson has produced a comprehensive, thorough, and truly great work on the law of Private Corporations, one that no court or lawyer can afford to overlook or neglect, for it evinces a study of the subject in its breadth and in its details which is marvelous, and the results of which cannot fail to be highly useful, not only to us of to-day, but to coming generations. Perhaps such a vast body of law on any one subject has never before been collected together and reduced to orderly arrangement and concise statement. The work is an immense magazine of learning, and yet of such practical bearing as to have no obtrusive air of erudition. Its only aim is to inform and aid the

reader. This work (5 Thompson on Corporations, sec. 7050) states the law of our question thus:

"Claims for damages for torts committed by the corporation prior to the appointment of the receiver, whether reduced to judgment or not, are not to be preferred before existing liens in the distribution of the funds in the hands of the receiver, but such claimants stand on the footing of general creditors. An exception to this rule is, that it is within the discretion of the court applied to for the appointment of a receiver to refuse the appointment, unless the petitioning bondholders will consent to an order that claims of this nature shall be preferred."

In holding the true law of the question to be otherwise, no necessary conflict with any personal or independent opinion of Judge Thompson is involved; for it does not ⁴³ appear that he has formed any deliberate opinion of his own touching this special question, or attempted more with his own mind than to follow on the line of the precedents which a few courts have furnished, state the supposed law as they lay it down, and cite, if not all, some of the cases relied on. If, on reading this present opinion even casually, he should differ with its conclusion, and this should become known to the writer, his own confidence in that conclusion would be startled, if not somewhat shaken, for on several branches of law, Judge Thompson is authority; on corporation law he is very high authority.

Judgment reversed, with direction,

Claims which Take Precedence Over Mortgages of Railway and Like Property.

Upon the foreclosure of a railway mortgage, questions frequently arise as to the priority of claims between employés, contractors, materialmen, and those holding under the mortgage. Claims for damages for personal injuries are also the subject of contention, in some cases, as to priority. As a general rule, a fixed legal right under a mortgage cannot be impaired by any equities subsequently arising, but railroad mortgages, and the rights of railroad mortgagees, are peculiar in their character, and affect peculiar interests. An application of the ordinary rules would require that lien creditors should first be satisfied in their respective order in full, and that unsecured creditors must go unpaid unless there is a balance after all of the liens are satisfied; but it is now a thoroughly established principle, though of modern date, that courts of equity may overthrow this order and give certain unsecured claims priority of payment over established liens; and it is our purpose here to show the justification of this most extreme exercise of power ever ventured upon by courts of equity, its limitations, and the particular classes of debts which

will be given such priority. There is no fixed and inflexible rule by which to determine what claim shall be preferred, as each case must be governed largely by its own special circumstances; but the tendency of judicial decision is to narrow the field of preferred claims rather than to enlarge it; and it is well to say, at the outset, that the allowance of preferred claims does not depend upon the order of court appointing a receiver. It is a general rule that the relative rank of claims and the standing of liens are unaffected by a receivership, except that the fund must first pay the proper expenses resulting from its administration by the court through the receiver: *Wood v. New York etc. R. R. Co.*, 70 Fed. Rep. 741; *Ellis v. Vernon Ice etc. Co.*, 86 Tex. 109. The earnings and profits of a railroad company are held by its officers as a trust fund for the payment of its debts; but, in the absence of contract liens or rights created by legal proceedings, they may exercise a reasonable and proper discretion as to the order in which debts of the company shall be paid, and this discretion cannot be taken from them by notice to the company that a particular creditor intends to demand a preference: *Newport etc. Bridge Co. v. Douglass*, 12 Bush, 673, 710.

Claims Generally.—If the mortgage of a railroad corporation covers its whole railroad, franchise, lands, and property, which have since been put into the hands of a receiver, and a suit in equity instituted to foreclose the mortgage, an intervening prior mortgagee of part only of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to his mortgage; as, in a suit to foreclose a mortgage of the whole railroad, franchise, and property of a railroad corporation, it would often produce great delay and embarrassment to undertake to determine the validity and extent of all prior liens and encumbrances on specific parts of the corporate property before entering a final decree. The railroad corporation, however, after having redeemed its property from the mortgage will hold it subject to any valid lien of the prior mortgagee, just as it did before the proceedings for foreclosure were instituted: *Woodworth v. Blair*, 112 U. S. 8. It is proper, where a railroad is in the hands of receivers, pending suits of foreclosure and settlement of the priority of liens, on the application of a lienholder claiming priority to extend the receivership, as to such claim, over the portion of the road on which the priority is claimed: *Mercantile Trust Co. v. Missouri etc. Ry. Co.*, 41 Fed. Rep. 8. If the earnings of a railway in the hands of a receiver are invested in betterments, which, without sale, are returned to the company, with its other property, at the close of the receivership, the company is liable for the satisfaction of any claim which the receiver ought to have paid out of the earnings, notwithstanding the existence of mortgages on the property: *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60. A purchase money

mortgage is a preferred lien upon the property covered by it over a mortgage previously executed to the trustees of the bondholders: *Hand v. Savannah etc. R. R. Co.*, 12 S. C. 314. If a statute authorizes the consolidation of railroad companies, and provides that outstanding debts of the respective companies shall not be affected by the consolidation, and further authorizes the new company to dispose of any property held by either of the old companies, and a company formed by the consolidation of two companies, issues bonds purporting to be first mortgage bonds, the outstanding debts of one of the old companies has priority over the debt secured by the first mortgage bonds, and a purchaser of these bonds is chargeable with notice of provisions of the act authorizing the consolidation: *Spence v. Mobile etc. Ry. Co.*, 79 Ala. 576. If the sureties on bonds executed by a railroad company, on appeal from condemnation proceedings, are compelled to pay the assessed value of lands condemned for the use of the railroad, and such payment is an indispensable condition to the vesting and perfecting of title in the railroad company or its mortgagee, and the company after such payment becomes insolvent, the sureties, upon the company's entire property being sold in payment of receivers' certificates and of mortgage indebtedness, are entitled to be repaid out of the funds in the hands of the receiver arising from a sale of such road: *Rome etc. R. R. Co. v. Sibert*, 97 Ala. 393. Purchasers at a foreclosure sale, having been represented in foreclosure proceedings by the trustees of the mortgage are bound by whatever binds the trustees, including the orders of court respecting the paramount liens of intervening claimants: *Union Trust Co. v. Morrison*, 125 U. S. 591. In this case a judgment creditor of a railroad company was enjoined, at the instance of the company, from seizing rolling stock included in a mortgage given by the company on all of its property. The injunction bond was signed by a surety, and a foreclosure suit followed, in which the court ordered the receiver to protect those who had become sureties, a time being fixed in which they were ordered to intervene. A surety did intervene within the time, and afterward paid the debt of the judgment creditor, and the court held that he was entitled to be paid from the earnings of the road. If the holder of a first lien upon the realty alone of a railroad company asks a court of chancery to take possession, not only of the realty but also of personalty used for the benefit of the realty, the indebtedness against or lien upon personalty should first be paid in preference to the claim secured by the realty: *Kneeland v. American Loan etc. Co.*, 136 U. S. 89.

Receivers—Condition—Orders of Court.—It seems that, when mortgage creditors ask a court of equity to take possession of railroad property and operate it through receivers, they consent to have all the liabilities resulting from such operation, including damages to persons by negligence, take precedence of their prior contract liens

which they are seeking by the proceeding to enforce: *St. Louis etc. Ry. Co. v. Holbrook*, 73 Fed. Rep. 112, 115; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 464, 479. If railroad mortgagees pray for the appointment of a receiver of mortgaged railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound, judicial discretion, may, as a condition of issuing the necessary order, impose such terms touching the application of the income arising during the receivership to the payment of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as, under the circumstances of the case, appear to be reasonable: *Fosdick v. Schall*, 99 U. S. 235, 251; *Union Trust Co. v. Souther*, 107 U. S. 591; *Farmers' Loan etc. Co. v. Kansas City etc. R. R. Co.*, 53 Fed. Rep. 182, and extended note thereto on preferential indebtedness upon the appointment of a receiver and the foreclosure of a railroad mortgage. But, while a court has the power to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage (*Mittenberger v. Logansport Ry. Co.*, 106 U. S. 286), it has no unlimited power in the matter of displacing vested liens. "The appointment of a receiver," says Mr. Justice Brewer, in *Kneeland v. American Loan etc. Co.*, 136 U. S. 89, 97, "vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea, that the chancellor, in the exercise of his equi-

table powers, has unlimited discretion in this matter of the displacement of vested liens." The terms of an order appointing a receiver do not vest in all claimants an absolute right as against the security holders: *Louisville etc. R. R. Co. v. Wilson*, 138 U. S. 501, 506; and do not impair or exclude the power of the court to order claims in question to be paid out of the corpus of property with priority: *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 465. "Such terms may be, and doubtless are a protection to the receiver; and what he does and pays within those terms may be, thereafter, beyond the challenge of anyone interested in the property. But when he has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment, but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver": *Louisville etc. R. R. Co. v. Wilson*, 138 U. S. 501, 506, per Brewer, J. Authority to give priority to certain claims is not limited to cases in which there has been a diversion of income: *Farmers' Loan etc. Co. v. Kansas City etc. R. R. Co.*, 53 Fed. Rep. 182.

Claims of Receivership.—If a court, through its receiver, takes possession of a railroad and operates it, the expenses of operation and management have priority over all other claims upon the property, whatever their nature may be. They are a first lien, not only on the income, but, if that is inadequate, on the corpus of the property itself; and take priority over precedent mortgages. No fund arises out of which the claims of creditors can be satisfied until the expenses of the receivership are paid: *Kneeland v. American Loan etc. Co.*, 136 U. S. 89; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434; *Myer v. Car Co.*, 102 U. S. 1; *Ellis v. Boston etc. R. R. Co.*, 107 Mass. 1; and the status of receivership expenses seems to be the same whether the appointment of a receiver is made at the instance of mortgagees, of judgment creditors, or of the corporation itself. As said in *Kneeland v. American Loan etc. Co.*, 136 U. S. 89, 98: "A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses

a prior lien on the property itself." To the same effect is *Kneeland v. Bass etc. Works*, 140 U. S. 592, which arose out of the same receiverships, and in which the court gave priority out of the corpus to a claim for supplies furnished to the receiver appointed for the judgment creditor. But compare *Central Trust Co. v. Wabash etc. Ry. Co.*, 46 Fed. Rep. 26, countenancing the notion that the expenses of receiverships created on the application of others than mortgagees, have priority over mortgage bondholders only out of the income, and not out of the corpus of the mortgaged property. This, however, as above shown, is not the law. Allowances to railroad receivers and their solicitors by way of compensation for services rendered are taxable as part of the costs, and, as such, are entitled to priority over the receivers' certificates: *Petersburg etc. Co. v. Dellatorre*, 70 Fed. Rep. 643. A receiver's expenditures made under the direction of the court, for preserving, completing, and operating a railroad, may be made a preferred claim against it: *Hale v. Nashua etc. R. R.*, 60 N. H. 333.

Among the expenses which should be allowed him are reasonable fees for counsel employed by him in the proper discharge of his trust, the cost of litigation, and his expenses in taking care of, protecting, and repairing the property in his charge: *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606; *Cowdrey v. Railroad Co.*, 1 Woods, 331. This matter will be discussed more in detail further on.

"Back" Claims.—If a court, through its receiver, takes possession of a railroad at the request of mortgagees and operates it for their benefit, certain classes of debts previously incurred by the railroad will be paid by the court notwithstanding the prior lien of mortgage bondholders. In other words, the mortgage lien will be postponed to the payment of unsecured creditors falling within the preferred classes. This question was thoroughly considered in *Turner v. Indianapolis etc. Ry. Co.*, 8 Biss. 315, holding that the court can require the receiver of a railroad to pay the claims of operatives and supply-men, owing at the time of his appointment, and even to hold the property subject to them—not as a lien on the road, but in the exercise of the equitable jurisdiction of the court. In this case, Drummond, J., delivered the following opinion, valuable for the reasons therein given: "I will state some of the reasons which have caused the court to adopt the practice which exists in this circuit, in relation to material and supplies which have been furnished railways, and labor performed on them, when they are placed in the hands of receivers by the court.

"The question is important, because there have been within a few years numerous railways in this circuit operated by receivers, the annual income of which is many millions of dollars.

"It will be borne in mind that in all cases where a foreclosure has been sought by the bondholders, the mortgages provide that the after-acquired property shall be bound by the mortgage, and it has been decided by the supreme court that such a contract overrides any judgment obtained against the railway company and execution is.

sued, even as to personal property coming into the possession of the company before judgment and execution.

"The railways do not come within the control of the court until after default on the bonds or coupons, and generally after absolute insolvency. There are, therefore, when application is made to the court for the appointment of a receiver, in all cases large balances due to operatives, and for supplies and materials furnished. There are also contracts running with other railways, upon which balances are due, and which contracts must often be continued in force in order to preserve the security of the mortgagees. The receiver takes the road with the benefits accruing from such contracts, and uses any supplies or materials which are on hand, and not paid for. It, therefore, early became a question in this species of litigation what rule should be adopted by the court as to such claims against railway companies. A very simple way to dispose of the question was to take the railway at the time it came into possession of the court, pay for all work done and supplies furnished thereafter, and refuse to pay any debts so incurred before. But that seemed impracticable. It was not like an ordinary mortgage on a farm or a house. A railway is a matter of public concern. It is one of the great instruments of modern commerce between states and nations. The public as well as private interests require its continual operation. To refuse to pay anything whatever for past services, or supplies, or materials has never, it is believed, been attempted by any court, or even demanded by any mortgagee. The receiver goes into the possession of the railroad with all its appliances and instrumentalities, with its men at work on the track, or running the trains, with its coal, oil, tools, and other means of operating the road. The mortgagees have come into court asking it to assume possession of the road to protect their interests. Are the interests of all others, operatives and supplymen, who happen to have claims against it at the time to be absolutely ignored in the case of insolvent companies? I think not.

"The appointment of a receiver is, to a great extent, a matter of discretion in the court, and it has been thought that the court might require the receiver to pay certain of these claims, and even to hold the property subject to them; not as a lien on the road, but in the exercise of the equitable discretion of the court in dealing with property which is of a peculiar character, and under circumstances of which the past history of litigation affords no example or precedent.

"What should be included within the claims to be paid has also been the subject of consideration, and the practice has been to allow all to be paid that could be fairly regarded as a part of the actual operating expenses of the road, whether for labor or supplies, in their various forms. It being conceded that some claims for past services should be paid, the next point to be determined was, what limitation, if any, as to time should be placed upon such payment. It was found, in many cases, that those who had control of the railways, instead of paying the current operating expenses of the com-

panies, would postpone the payment of the same, sometimes for many months, in favor of the interest due on the mortgages, which they would discharge, in the hope, apparently, that a more favorable time in the business of the roads would enable them to make up the deficiency. It was in view of this and similar considerations growing out of the actual condition of affairs, and of the absolute necessity of fixing some reasonable time within which such claims should be allowed, that the court adopted, as by analogy, the rule of the statute of Illinois, in relation to liens on railroads for work done, and supplies and materials furnished. During the discussions which have taken place on this subject, the allowance of these 'back' claims has been sometimes called a lien, but, in point of fact, it never has been, nor can it be, justly so considered, but, as already stated, as an exercise of the equitable power of the court in the premises.

"It is but fair to say, in the numerous cases which have come before the court, its rulings upon this subject have been generally acquiesced in by the counsel of the mortgagees.

"The magnitude of the claims in this case is such as perhaps to cause hesitation in following the rule which has been heretofore established, and makes it desirable to obtain from the supreme court a decision which shall announce some just principle that may be a guide in these and similar cases.

"While it has been generally admitted that the court had a discretionary power in the direction indicated, to disburse the earnings of the road, it has been insisted that these claims should not be considered binding on the property in case of foreclosure and sale.

"The view that has been taken of that branch of the subject has been this: In general, when the mortgagees have come before the court to ask for the appointment of a receiver, the property has been in a very dilapidated condition, the rails nearly worn out, the ties needing replacement, the rolling stock, stationhouses and bridges out of repair; the whole property being in a condition to render the transit of persons and merchandise dangerous. The practice has, therefore, been, instead of immediately directing the receiver to pay for labor, or supplies, or materials previously furnished, to expend the receipts in repairs of the road, in the purchase of new iron or of steel, and of rolling stock, and in the construction and repair of sidetracks, bridges, stationhouses, etc., thus adding to the security of the mortgagees by enhancing the value of the property. It has been thought that, under the same equitable discretion which has been heretofore referred to, this gave the operatives and materialmen a just claim upon the property itself. It has not unfrequently happened that railroads which were comparatively worthless when they came into the possession of the court have become under its administration, valuable property.

"It is for these and other like reasons that the court, in the appointment of receivers in all cases of railroads in this circuit, has required them, either at the time of such appoint-

ment, or as being so understood then, by subsequent order, to pay for labor performed, or supplies or materials furnished, during the time indicated. The court has always treated this kind of property as including in the security given to the mortgagees, not only real and personal estate, in the ordinary sense, but franchises and intangible property.

"The experience of the court which, it may be said, has been obtained by the management, for many years, of immense amounts of this kind of property, has satisfied it that, practically, it would be well nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims, of the character mentioned, existing at the time of their appointment, and that the limitation already stated is not an unreasonable one, in view of all circumstances." The conclusions and practice stated in the above opinion were substantially sustained, at least with respect to the broad groundwork, in *Fosdick v. Schall*, 90 U. S. 235. Further on, however, we shall notice, in detail, the branches of the subject discussed by the experienced judge of railroad matters, and attempt to show the present condition of the law with respect to them.

Allowance of Claims by Consent—Bad Faith.—If the lien of an intervenor for the amount due him is recognized by the court, or receiver, as superior to that of mortgage creditors, and the receiver, acting under orders of court, makes a contract with the intervenor to sell the mortgaged property, and to pay him from the proceeds of the sale, the rights of the intervenor may be enforced, if his claim is not paid according to agreement, by an order for a resale of the property in satisfaction of the intervenor's claim: *Farmers' Loan etc. Co. v. Newman*, 127 U. S. 649; partly reversing the same case in 32 Fed. Rep. 805, where it was held that an order setting aside the sale, and putting the receiver again in possession, was the proper remedy. If a claimant intervenes, in a foreclosure suit, and the master to whom his claim is referred reports that the demand has not been contested and should be allowed, and that the intervenor is entitled to a lien for the amount due him superior to that of mortgage creditors, the report will be confirmed where no exceptions to it have been filed and all parties in interest have assented: *Central Trust Co. v. Wabash etc. R. R. Co.*, 24 Fed. Rep. 98. In a suit to foreclose railroad mortgages, one of the defendants set up title to certain of the rolling stock, under a levy and sale on execution against the railroad corporation. His title was denied, and the interlocutory judgment of sale excepted this stock, and referred the issue of ownership. After the sale the receiver was authorized to purchase rolling stock, the price paid to be a first lien on the mortgaged property and on its proceeds. The receiver agreed with the claimant for the use of that to which he had set up title, and that he should be paid for it in case he prevailed on the question of ownership. This stock was used for ten years by the receiver. The foreclosure sale was then confirmed, payment being made almost wholly by the surrender of the mortgage bonds, and the purchasers organized a new corporation.

The claimant finally prevailed on the issue of his title to the stock, and it was held that he could enforce payment against the property in the hands of the new corporation: *Vilas v. Page*, 106 N. Y. 439. So, where a receiver was authorized by a consent order, without a reference, to construct an extension of a railroad at a cost not to exceed an amount stated, to be paid out of surplus income, the extension to stand pledged for such payment, but the extension was built at a greater cost and then sold as a part of the entire road, it was held that the receiver acted only as agent of the consenting bondholders, but that the extension was covered by a lien, superior to existing liens, in favor of those who furnished the money to build it, and that they were entitled to such ratable proportion of the proceeds of sale as the value of the extension bore to the value of the entire road, considered only in reference to the purchase money of the whole: *Hand v. Savannah etc. R. R. Co.*, 17 S. C. 219, 277.

"Going Concern"—Operating Expenses—"Back" Claims.—A railroad is a matter of public concern. It is kept in operation for the benefit of stockholders, mortgage bondholders, and the public. All of them are interested in keeping it a "going concern," and all who contribute toward this end "deserve and receive all the assistance the courts can give them without violating the essential right of property." Hence, recent claims for labor and materials which were necessary to keep the railroad a "going concern," and which have inured to the benefit of the mortgaged property, are a first charge upon its earnings and upon the proceeds accruing from its sale under a decree of foreclosure: *Finance Co. v. Charleston etc. R. R. Co.*, 48 Fed. Rep. 188; 40 Fed. Rep. 693; 52 Fed. Rep. 524; *Blair v. St. Louis etc. Ry. Co.*, 22 Fed. Rep. 769; *Eells v. Johann*, 27 Fed. Rep. 327; *Farmers' Loan etc. Co. v. Vicksburg etc. R. R. Co.*, 33 Fed. Rep. 778; *Street v. Maryland Cent. Ry. Co.*, 59 Fed. Rep. 25; *Newgass v. Atlantic etc. Ry. Co.*, 72 Fed. Rep. 712; *Jones v. Central Trust Co.*, 73 Fed. Rep. 568; *Greenwood v. Algesiras Ry. Co.*, L. R. [1894] 2 Ch. 205; *Burnham v. Bowen*, 111 U. S. 776; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434; *Skiddy v. Atlantic etc. R. R. Co.*, 3 Hughes, 320; *Atkins v. Petersburg R. R. Co.*, 3 Hughes, 307; *Vilas v. Page*, 106 N. Y. 439; *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705; *Addison v. Lewis*, 75 Va. 701; *Williamson v. Washington City etc. R. R. Co.*, 33 Gratt. 624; *Douglass v. Cline*, 12 Bush, 608.

As said by Jenkins, J., in *Farmers' Loan etc. Co. v. Green Bay etc. Ry. Co.*, 45 Fed. Rep. 664: "The supreme court, as I read the opinions, has been most careful to limit the doctrine to claims representing that which has inured to the benefit of the mortgaged property, such as labor and supply claims, amounts due to connecting roads for material, repairs, ticket and freight balances, and the like, allowing priority to such claims, because their nonpayment would cause cessation of work, supplies, and running arrangements, and result in stoppage in the operation of the road, which in the interest, as well of the bondholder as of the public, is not to be tolerated. The doctrine is analogous to that of the

admiralty allowing certain supplies to a vessel precedence over a mortgage upon the vessel, and rests upon the same principle. The vessel must not be allowed to rot at the wharf. The railway must not be permitted to rust, and its franchise to be forfeited, through failure to operate. Such things, therefore, that are done to avoid such result working destruction to the mortgage should be compensated in priority to the mortgage." It is, therefore, the practice of courts of equity, in applying the principle that priority of payment of such claims should be allowed over a precedent mortgage in the case of railways, to apply the gross income arising from the operation of the railway first to the payment of the expenses of operation, proper equipment, and needful improvements: *Farmers' Loan etc. Co. v. Green Bay etc. Ry. Co.*, 45 Fed. Rep. 664; *Turner v. Indianapolis etc. Ry. Co.*, 8 Biss. 315.

Consequently, the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements: *Thomas v. Peoria etc. Ry. Co.*, 6 Fed. Rep. 808, 818. Such interest on the company's indebtedness as it is prudent and proper to keep in a permanent form, and any floating or temporary liabilities which good judgment would require to be presently paid, as well as any annual contribution to a sinking fund for the payment of debts, whenever it is expedient and proper to provide such a fund, may also be subtracted from the gross receipts, and what is left will constitute the "net earnings": *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445.

With respect to unpaid debts for operating expenses, contracted before the appointment of the receiver, Blatchford, J., in delivering the opinion of the court, in *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286, 311, said: "It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road, and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would

be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the goodwill and integrity of the enterprise, and entitle them to be made a first lien."

Before proceeding to state specifically what claims may be allowed priority over a railroad mortgage, it will be well to state, in a body, though at the expense of some repetition, a few general principles which have been announced by the supreme court of the United States, speaking through Mr. Chief Justice Waite, as follows: 1. "When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable": *Fosdick v. Schall*, 99 U. S. 235, 251; *Union Trust Co. v. Souther*, 107 U. S. 591. 2. It frequently happens, when a railroad company becomes pecuniarily embarrassed, that "debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt." It must, therefore, be held in equity that "every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income"; and it results that "the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements": *Fosdick v. Schall*, 99 U. S. 235, 252. 3. "If, for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control": *Fos-*

dick v. Schall, 99 U. S. 235, 252. 4. If no order is made, when a receiver is appointed, that will, in terms, save the rights of creditors furnishing supplies, equipment, labor, etc., and it appears, in the progress of the cause, that bonded indebtedness has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, "it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights": *Fosdick v. Schall*, 99 U. S. 235, 253. "While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment": *Fosdick v. Schall*, 99 U. S. 235, 254.

If current debts are incurred by a railroad company in the operation of its current business, they are chargeable upon the current income, as against those who hold the mortgage bonds of such railroad, whether they accrued before or after the railroad went into the hands of a receiver: *Farmers' Loan etc. Co. v. Vicksburg etc. R. R. Co.*, 33 Fed. Rep. 778; *Ames v. Union Pac. Ry. Co.*, 74 Fed. Rep. 335; *Douglass v. Cline*, 12 Bush, 608; *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 704; *Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.*, 71 Fed. Rep. 245; *Addison v. Lewis*, 75 Va. 701; *Litzenberger v. Jarvis-Conklin Co.*, 8 Utah, 15; *Wood v. New York etc. R. R. Co.*, 70 Fed. Rep. 741, 743, and numerous cases there cited; and the fact that such debts were incurred for betterments does not affect the right to have them paid out of the current income, if such betterments are shown to have been necessary: *Farmers' Loan etc. Co. v. Vicksburg etc. R. R. Co.*, 33 Fed. Rep. 778; *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705. Priority in payment is generally conceded to claims for the operating expenses of an insolvent railway in the hands of a receiver over the mortgage debts of the company: *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705; *Litzenberger v. Jarvis-Conklin Co.*, 8 Utah, 15.

No Rule as to Time.—Notwithstanding what is said in the opinion of Drummond, J., in *Turner v. Indianapolis etc. Ry. Co.*, 8 Biss. 315, above quoted, and in some other cases, concerning the time within which a claim must have been contracted, before the appointment of the receiver, and within which, if it is a preferred claim, it may be enforced, there is no fixed rule upon the subject. There is no six months rule: *Farmers' Loan etc. Co. v. Kansas City R. R. Co.*, 53 Fed. Rep. 182, 187. The allowance of preferred claims, in equity, against the property of a railway company, in the hands of a receiver does not depend upon any fixed or arbitrary rule as to the time when the debts were contracted, further than that they must have been contracted within a reasonable time before the appointment of the receiver, such reasonable time depending upon the circumstances of each particular case: *Wood v. New York etc. R. R. Co.*, 70 Fed. Rep. 741, 743; *Northern Pac. R. R. Co. v. Lamont*, 69 Fed. Rep. 23; *Blair v. St. Louis etc. R. R. Co.*, 22 Fed. Rep. 471; *Central Trust Co. v. Thurman*, 94 Ga. 735; *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115. Claimants having statutory liens against a railroad for labor performed in its construction, operation, and maintenance, who, before such liens expire, are prevented from enforcing them by the appointment of a receiver, will not be denied the priority to which they are entitled, merely because their claims accrued more than six months before the appointment of the receiver: *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705; *Farmers' Loan etc. Co. v. Vicksburg etc. R. R. Co.*, 33 Fed. Rep. 778; *Northern Pac. R. R. Co. v. Lamont*, 69 Fed. Rep. 23; notwithstanding the court has made a provisional order prescribing six months as the limit of time within which claims to be entitled to priority must have accrued: *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705; *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60.

Advances.—If a railroad company is in difficulty, before the appointment of a receiver, from its employes threatening to strike for the nonpayment of wages due for months past, and, on appeal by its officers to bondholders, the latter advance money necessary for the payment of the back wages due, upon a distinct understanding that they shall be reimbursed out of the first net earnings of the company, and that the money advanced shall be paid to the employes, and afterward, before their reimbursement, the road goes into the custody of a court under the appointment of a receiver, equity clearly requires that such advances must be paid in preference to the claims of mortgagees, out of income accruing while the road is in the custody of the court. They must be treated as preferred debts, as it was absolutely essential to the interests of all that the claim of the employes should be satisfied: *Atkins v. Petersburg R. R. Co.*, 3 Hughes, 307, 319. But the necessity must be strong and manifest. While advances may have enabled a railroad company to maintain itself as a going concern, that fact alone does not give such advances priority over first mortgage bonds upon the theory that the interests of the public and of the bondholders were subserved by such ad-

vances. It may be that the money advanced was simply a loan, and the mere fact that money loaned to a railroad corporation was expended in payment of interest on its first mortgage bonds, or even of its operating expenses, even though the effect of such payment is to subserve the interests of the public and of the bondholders, does not entitle the lender to preference over the first mortgage bonds, either by way of subrogation or on the ground of superior equities. The relation of debtor and creditor exists in such a case, and no equity can arise in favor of the creditor as against other creditors holding security prior in time, by reason of the voluntary application the debtor might make of the money borrowed: *Morgan's etc. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 198.

Assigned (la 18.—The right of preference for a claim for labor, supplies, equipment, or permanent improvements on railroad property in the hands of a receiver attaches to the debt itself, and the assignee of such a debt has, therefore, the same rights as the original holder: *Northern Pac. R. R. Co. v. Lamont*, 69 Fed. Rep. 23; *Burnham v. Bowen*, 111 U. S. 776; *Union Trust Co. v. Walker*, 107 U. S. 596. If an arrangement is made with a railroad company, whereby a sufficient amount of the wages of its laborers is retained by the company to pay their board, the claims of the boarding-house keepers for such amount are to be treated as claims originally due laborers, and duly assigned to the holders, and their assignment does not destroy their right to priority: *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705.

Attachment.—A creditor of a railroad company, who had secured a judgment, attached certain property of the company, which was covered by mortgages. But, in order to preserve the unity of the property and to keep the railroad a going concern, the trustee in the mortgages caused the property to be replevied, and bonds to be given, with sureties, for the return of the property, or for the payment of its value, if adjudged to be subject to the attachment. It was ultimately adjudged to be so subject, but, in consequence of its having been taken into possession by a receiver appointed in a foreclosure suit instituted by the trustee, it was impossible for the sureties on the replevin bonds to return the property, and executions were directed to issue against them for its value. Under these circumstances, it was held that the receiver was properly directed to pay, out of the property in his hands, the claim of the attaching creditor, and for whose benefit the decree against the sureties on the replevin bond was made, although his claim was not, in itself, superior to the mortgage: *Jones v. Central Trust Co.*, 73 Fed. Rep. 568.

Attorney's Fees.—The services of an attorney, in securing payment to the receiver of a railroad, of rent due for railroad property, as well as in securing a return of the property, are entitled to priority of payment over the secured liens on a sale of the road under foreclosure of a mortgage upon it: *Louisville etc. R. R. Co. v. Willson*, 138 U. S. 501. So, if, upon the suit of the holder of second mortgage

railroad bonds, a receiver is appointed with the consent of all interested parties, and to the advantage of all, the services rendered by the complainant's attorney, being for the common benefit, should be paid for from the fund in which all the creditors are interested: *Bound v. South Carolina Ry. Co.*, 43 Fed. Rep. 404. But, the term "wages of employés," as used in an order of court directing the payment of certain classes of debts out of the proceeds of the sale of a railroad under foreclosure, in preference to the secured liens, does not include the services of counsel employed for special purposes: *Louisville etc. R. R. Co. v. Wilson*, 138 U. S. 501. Contra, *Finance Co. v. Charleston etc. R. R. Co.*, 52 Fed. Rep. 526, holding that a lawyer employed at a fixed salary per month does come within the terms of such an order. Where the services of attorneys have nothing to do with keeping the road a going concern, they cannot be allowed, especially where the services were rendered long before the appointment of the receiver: *Bound v. South Carolina Ry. Co.*, 51 Fed. Rep. 58; *Finance Co. v. Charleston etc. R. R. Co.*, 52 Fed. Rep. 526, 678; and the fact that such services resulted in benefit to the bondholders does not justify the displacement of the latter's lien, when they were not parties to the contract of employment: *Finance Co. v. Charleston etc. R. R. Co.*, 52 Fed. Rep. 678. Neither can counsel fees of the mortgagor be paid out of money in the hands of the receiver, where the mortgaged property is insufficient to pay the mortgages: *Mercantile Trust Co. v. Missouri etc. Ry. Co.*, 41 Fed. Rep. 8.

Bonds.—If interest due on railroad bonds, secured by a statutory lien, and entitled to a priority over bonds secured by a mortgage, is funded by the issuing of new bonds, to be secured by the extension of the lien, the new bonds are entitled to priority over the mortgage bonds: *Gibbes v. G. & C. R. R. Co.*, 13 S. C. 228. But, where the holders of a portion of the first mortgage bonds of a railroad company severally consent to the issue of preference bonds of like character, to be a lien on the road prior to their bonds, the transaction constitutes an equitable mortgage, and in no way changes the rights of the nonassenting first mortgage bondholders: *Poland v. Lamoyille Valley R. R. Co.*, 52 Vt. 144. And a bona fide purchaser, before maturity, of coupon bonds of a railroad company, payable to bearer, takes them freed from any equities that might have been set up against the original holder: *Kneeland v. Lawrence*, 140 U. S. 209.

Construction Claims and Improvements.—It is a general and well-settled rule that claims for original construction of a railroad, and for materials furnished therefor, are not entitled to priority over a mortgage, as such debts are more properly to be classed with the general debts of the corporation than with those incurred for current expenses. There is a vital difference between a debt for construction and one for operating expenses. The doctrine of the leading case of *Fosdick v. Schall*, 99 U. S. 235, extensively quoted from above, is applicable wholly to the latter class of liabilities, and does

not apply to a question of original construction, subsequent to the mortgage and before the appointment of a receiver: *Wood v. Guarantee Trust Co.*, 128 U. S. 416; *Thompson v. White Water Valley R. R. Co.*, 132 U. S. 68; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649; *Fogg v. Blair*, 133 U. S. 534. But, while claims for the construction of a railroad are not, as a general rule, allowed priority over mortgage debts of the company, unless the work was done or the material furnished in pursuance of an order of the court, there may be construction claims that appeal as strongly to the conscience of a court of equity as the debts commonly known as operating expenses. Thus, when mortgages are executed upon an unfinished road, which show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, the new road should be considered a useful improvement; and, if the road is put into the hands of a receiver before the work and materials are paid for, holders of the claims for such work and material should be paid from the net income of the road while under the control of the court, if there is a fund on hand that can be applied to such payment, and they have not been guilty of any laches: *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705.

Interest.—As the income of a railroad company in the hands of a receiver, must first be applied to the expenditures necessary to keep it a going concern, interest cannot be paid to holders of mortgage bonds until claims for the purpose of keeping the road in operation have been paid: *Finance Co. v. Charleston etc. R. R. Co.*, 48 Fed. Rep. 188; 49 Fed. Rep. 693; 52 Fed. Rep. 524; *Cleveland etc. R. R. Co. v. Knickerbocker Trust Co.*, 64 Fed. Rep. 623. But the court is sometimes called upon, in adjusting the affairs of an insolvent railroad corporation, to determine what should be the priority of payment of interest on bonds, in order to preserve the property intact, so far as possible, for all the creditors, secured and unsecured, in the proper order of their priorities, and may declare a debt represented by certain coupons superior in point of lien to that represented by other coupons. It may order receivers, if they have the money, to pay interest to secure pledged stocks and bonds, of immense value, as assets valuable in themselves, and still more valuable because they preserve the control of subsidiary railroads, steamboats, coal fields, and other appurtenances essential to the system as a whole; although such payment is made upon coupons of bonds bearing date subsequent to that of a prior mortgage, and which mortgage may be a superior lien: *Park v. New York etc. R. R. Co.*, 64 Fed. Rep. 190.

Rolling Stock—Machinery—Repairs—Rental of Cars, etc.—If a court of equity has possession, in a foreclosure suit of the property of a railroad company, it has jurisdiction to authorize the creation of debts for rolling stock and other purposes, when, in its opinion, it is necessary to do so to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property: *Vilas v. Page*, 106 N. Y. 439. Rolling stock

purchased by the receivers of a railroad pending its sale by a court of chancery, is subject to the liens authorized by the court in the order for its purchase, and liens for such rolling stock will have priority over the trust deed; *Meyer v. Johnston*, 53 Ala. 237. A court will also authorize the receiver of a railway company to make all necessary repairs, and, if necessary, will charge the expense as a first lien on the property prior to existing mortgages thereon: *Hoover v. Montclair etc. Ry. Co.*, 29 N. J. Eq. 4; *Ex parte Mitchell*, 12 S. C. 83. Money expended for rolling stock and machinery should be allowed as a lien upon the trust property prior to that of the bondholders: *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606. Payment out of the earnings of the road for the rent of cars for the time they were used by the receiver is also proper: *Fosdick v. Schall*, 99 U. S. 235; *Thomas v. Peoria etc. Ry. Co.*, 36 Fed. Rep. 808. Parties who have, before the appointment of a receiver of a railway company, furnished the company with car-springs, and spirals and supplies for its machinery department, and which the receiver has continued to use in carrying on the business of the road, have a superior equity to that of the bondholders, and should be paid out of the net earnings of the road: *Hale v. Frost*, 99 U. S. 389. Cars which were bought by the railroad company under a conditional sale, after the execution of a mortgage upon all of its property, including after-acquired property, and which have been used by the receiver, must be paid for by him, where the lien created by the conditional sale was, to all intents and purposes, valid and subsisting when the receiver, on his appointment, took possession of the property: *Myer v. Car Co.*, 102 U. S. 1, 12. An equitable claim for rent of cars may be charged on the income during the receivership, and, if that is inadequate, upon the proceeds of the mortgaged property: *Thomas v. Peoria etc. Ry. Co.*, 36 Fed. Rep. 808. If, upon the application of the trustee of a railroad mortgage, a receiver is appointed and takes possession of the road and rolling stock, and among the latter is rolling stock which the company was operating under a lease, and the receiver continues to operate it, its rental at the contract price, and not according to its actual use, if not paid from the earnings, will be a charge upon the proceeds of the sale under the foreclosure of the mortgage prior to the mortgage debt: *Kneeland v. American Loan etc. Co.*, 136 U. S. 89. If cars are delivered to a corporation under a recorded lease contract, with provision therein for final sale and for a reservation of title in the lessor until the cars are fully paid for, and a receiver of a railway company, to which these cars had been delivered by the lessee, or its successor in possession, takes possession of the cars after certain partial payments upon the lease contract have been made, and the court, upon a proper application by the owner of the cars, refuses either to adopt and complete that contract or to return the cars to such owner, but, on the contrary, orders the receiver to retain and use them, though finally directing their return to the owner, the latter becomes entitled to a reasonable rent for the cars, covering the time they were used by the receiver, as a part of the expenses of the

receiver's administration of the railway company's property; and the amount of such rent should be arrived at upon the basis of the actual value of the cars for rent, and not upon the basis of what the receiver actually received as mileage from other roads for the use of the cars. In such a case, a trustee of the bondholders of the railway company, who resisted the return of the cars and participated in procuring the order refusing to restore them to the owner, is certainly estopped from denying that the rental of the cars is an expense of the receivership prior in dignity to the lien of the mortgage securing the payment of the bonds: *Lane v. Macon etc. Ry. Co.*, 96 Ga. 630. And, the following principles, as stated by the court, ought to control in adjusting the equities between the contending parties: 1. The proceeds of the sale of the property of the railway company are chargeable with the claim for rental due to the owner of the cars from the time they went into the railway company's possession until their final return, the amount of rent to be ascertained as above indicated; 2. The owner of the cars is also entitled, out of such proceeds, to the cost, of extra repairs on the cars, for depreciation over and above that caused by ordinary wear and tear; but is not entitled to anything for depreciation in the cars resulting from their usual and proper use; 3. The owner of the cars is also entitled, out of such proceeds, to the expenses paid by him and which were incurred in returning the cars to the place where the court ordered them to be delivered to him; 4. Interest should be allowed on the above claims from the date of such delivery, and they should rank in dignity prior to the lien of the bondholders upon the fund derived from the sale of the property of the railway company; 5. The above claims of the car owner should be credited with all the payments made upon the lease contract; and for the general balance thus found due such car owner, he should have a decree, of the rank and dignity above stated, payable out of the fund above mentioned: *Lane v. Macon etc. Ry. Co.*, 96 Ga. 630.

A claim for repairs of cars may be allowed upon the receiver's agreement to keep the cars in good repair for use on the road: *Thomas v. Peoria etc. Ry. Co.*, 36 Fed. Rep. 808. Receivers' certificates issued for necessary repairs must be allowed priority; and receivers' certificates issued to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for betterments in replacing worn-out parts of the road, while large debts had been incurred for the operating expenses and ordinary repairs, are to be allowed priority: *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 454, 458.

Services—Wages, etc.—Those who have performed services in keeping a railway a going concern, or who have contributed to the value of the property, have a claim upon the current income of the road, when placed in the hands of a receiver, which is superior in equity to that of the mortgage bondholders; and this includes demands for wages due at the time the road goes into the receiver's hands. In other words, "back" wages due at that time have priority

over the lien of an existing mortgage: *Douglass v. Cline*, 12 Bush, 608; *Calhoun v. St. Louis etc. Ry. Co.*, 14 Fed. Rep. 9; *Litzenberger v. Jarvis-Conklin Co.*, 8 Utah, 15; *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705; *Atkins v. Petersburg R. R. Co.*, 3 Hughes, 307; *Skiddy v. Atlantic etc. R. R. Co.*, 3 Hughes, 320; *Blair v. St. Louis etc. R. R. Co.*, 22 Fed. Rep. 471.

An order of a court of equity, on appointing a railroad receiver, directing the payment of wages due employes for a reasonable period prior to the receivership, is merely a personal protection, given *ex gratia* to those who depend upon their daily labor for support, and will not cover a claim by a merchant for rations furnished to such laborers, under contract with the company, and for which the company alone is liable, although it charges the rations to its laborers as part of their wages. The claim is, however, entitled to payment before the payment of interest on the mortgage bonds, and if any sums applicable thereto have been paid out for such interest, or for permanent improvements, whereby the bondholders have been benefited, the claim will be a charge, to the amount of the moneys so diverted, upon any earnings in the hands of the receiver, or if these fail, upon the proceeds of the sale of the road: *Finance Co. v. Charleston etc. R. R. Co.*, 49 Fed. Rep. 693; 52 Fed. Rep. 524. The terms "servant" and "employe" have been held not to include the secretary of a railroad company: *Wells v. Southern Minn. etc. Ry. Co.*, 1 Fed. Rep. 270; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 69 Fed. Rep. 295; and, while the general freight and passenger agent of a navigation company, which has passed into the hands of a receiver, has a valid claim for the arrears of his salary, he has no equity to priority of payment over the mortgage creditors: *Bound v. South Carolina Ry. Co.*, 50 Fed. Rep. 312. So, if a railroad mortgage gives the debt secured a first lien, and the road goes into the hands of a receiver without funds, and the earnings under his management are barely enough to pay current operating expenses, arrears of the salary of the president will not be paid in preference to the mortgage debt out of the proceeds of the road: *National Bank v. Carolina etc. R. R. Co.*, 63 Fed. Rep. 25.

If the holder of claims against a railway company for wages takes notes of the company indorsed by its president, but without intending to waive his right to priority of payment, the taking of such notes is not a waiver of his right: *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705. So, as against an account for freight and balances of freight exchange between two railroad companies, where the creditor company holds the debtor's note, secured by its mortgage bonds, on an agreement that the note is "to be payment when paid," this is not a waiver of a right to claim payment from proceeds of the sale, on foreclosure of the road belonging to the debtor company: *Finance Co. v. Charleston etc. R. R. Co.*, 62 Fed. Rep. 205. See, *infra*, subhead, "Statutes—Lien of Mechanics, Laborers, Materialmen, and Others," for further questions as to wages, laborers' liens, etc.

Second Mortgages.—If a railroad company whose property is covered by two mortgages buys on credit rails which are necessary for the purpose of keeping its road going, and the road is afterward placed in the hands of a receiver on application of the second mortgagees, the seller of the rails has an equitable right, as against the second mortgagee, to have the earnings of the road in the hands of the receiver applied first to the payment of his claim: *Bound v. South Carolina Ry. Co.*, 47 Fed. Rep. 30.

Supplies, Materials, etc.—Persons who furnish labor, or necessary supplies and materials, such as machinery, and cars, locomotives, and other rolling stock, and coal for fuel, and coupling links and pins and tank steel necessary for daily use, to a railroad, in order to keep it a going concern, are entitled to payment out of the earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as interest on the bonds, or for permanent improvements, whereby the bondholders have been benefited, the court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of the receiver, or, if the income is insufficient, out of the proceeds of a sale of the mortgaged property: *Finance Co. v. Charleston etc. R. R. Co.*, 48 Fed. Rep. 188; 49 Fed. Rep. 693; 52 Fed. Rep. 524; *Burnham v. Bower*, 111 U. S. 776; *Kneeland v. Bass etc. Works*, 140 U. S. 592; *Thomas v. Western Car Co.*, 149 U. S. 95; *Fidelity etc. Deposit Co. v. Shenandoah Valley R. R. Co.*, 86 Va. 1; *Clark v. Central R. R. etc. Co.*, 66 Fed. Rep. 803; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Car Co.*, 99 U. S. 256; *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606; *Meyer v. Johnston*, 53 Ala. 237. But, independently of diversion, debts may be preferred which are incurred for labor and supplies in the operation and management of the road: *Wood v. New York etc. R. R. Co.*, 70 Fed. Rep. 741. Receivers should be directed to pay for coal, which has been furnished to and used by, a railroad company, for the purpose of carrying on its business, and not only that which was delivered to the receivers, but for that which had been previously delivered to the road and used, either before or after the receivership: *Clark v. Central R. R. etc. Co.*, 66 Fed. Rep. 803. Preferred debts for work done and materials furnished for the operation of a division of a system of railroads owned and operated by a single corporation constitute an equitable charge upon all the lines of the system, prior in right to both local and general mortgages: *Central Trust Co. v. Wabash etc. Ry. Co.*, 30 Fed. Rep. 332. And it will be presumed on appeal that such charges have been correctly distributed among the different divisions to which they properly belong: *Kneeland v. Bass Foundry and Machine Works*, 140 U. S. 592. A lien for supplies may be waived by accepting a new security inconsistent with the lien sought to be enforced: *Ohio Falls etc. Mfg. Co. v. Central Trust Co.*, 71 Fed. Rep. 916.

Sureties—Operating Expense.—A railroad went into the hands of receivers, appointed in a mortgage foreclosure suit, pending an ap-

peal by the company from a judgment against it. The judgment was affirmed, and the sureties on the appeal bond filed a petition alleging that suit had been brought against them on the bond, and asked that the judgment be paid. The mortgage trustee and the receiver consented to such payment, but it was resisted by the representatives of a minority of the junior bondholders. Under these circumstances it was held that the petitioners having by their execution of the bond, protected the funds of the railroad from abstraction by garnishment proceedings, and their liability not having become fixed for a definite amount until the condition of the bond was broken by the default of the company, which was after the appointment of the receiver, their claim was "a current operating expense," accruing during the receivership, and, therefore, should be paid out of current earnings: *Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.*, 71 Fed. Rep. 245.

Taxes.—The property of a railroad company in the hands of a receiver is liable for taxes in precisely the same manner as if there were no receivership. Hence, the state lien for such taxes has priority over the claims of mortgagees: *Central Trust Co. v. Wabash etc. Ry. Co.*, 26 Fed. Rep. 11; *St. Joseph etc. R. R. Co. v. Smith*, 19 Kan. 225; *Central Trust Co. v. New York etc. R. R. Co.*, 110 N. Y. 250; *Philadelphia etc. R. R. Co. v. Commonwealth*, 104 Pa. St. 80; and the court should see that taxes are paid before distribution to other creditors: *Greeley v. Provident Sav. Bank*, 98 Mo. 458. Receivers' certificates issued to pay tax liens have priority over the claims of mortgage bondholders: *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434. "The lien of the state for its taxes is undoubtedly prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfully in the custody of the law": *State v. Atlantic etc. R. R. Co.*, 3 Woods, 434. If a corporation engaged in the iron business is hopelessly insolvent, and in the hands of a receiver, taxes accruing during the time that the receiver was manufacturing raw product into finished material for the purpose of facilitating the sale of the company's property should be paid in full, notwithstanding the existence of mortgage bonds: *Gehr v. Mont Alto Iron Co.*, 174 Pa. St. 430. Receivers who take possession of and operate leased lines of railroad for more than a year, and receive the earnings thereof, must disburse them in accordance with the terms of the lease; and, where they apply such earnings first to the payment of interest on mortgage bonds, instead of paying the taxes as directed by the lease, the court will require them to restore the diverted money by paying the taxes in question even after the leased roads have been surrendered: *Clyde v. Richmond etc. R. R. Co.*, 63 Fed. Rep. 21.

Preservation of Property.—It is a part of the jurisdiction of a court of equity to protect and preserve trust funds in its hands; and, when it appoints a receiver of railroad and like property, and takes the property under its charge as a trust fund for the payment of encumbrances, it may, in equity, make the expenses of caring for,

protecting, and repairing the property, a lien paramount to a first mortgage thereon: *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 455; *Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.*, 71 Fed. Rep. 245. It may authorize the receivers to borrow money necessary to repair, preserve, and manage the property, and make the same a first charge upon the property, over a mortgage: *Greenwood v. Algesiras Ry. Co.*, L. R. [1894] 2 Ch. 205; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 455; *Stanton v. Alabama etc. R. R. Co.*, 2 Woods. 506. In *Union Trust Co. v. Morrison*, 125 U. S. 591, 613, it was adjudged that, where a railroad company whose property was mortgaged had sued out an injunction to restrain the enforcement of a judgment which was alleged to be fraudulent, and the effect of the injunction had been to preserve its assets and business, a surety who executed an injunction bond, exacted as a condition upon which the injunction was allowed, should be regarded as having rescued the mortgaged property from destruction, and that he was entitled to be protected by having a judgment obtained against him on the injunction bond paid by a receiver, out of the assets of the corporation; and it was further adjudged in that case that it was not necessary for the surety to first pay the judgment before applying for relief, but that, according to the principles of equity, he was entitled to be protected without subjecting himself to the additional burden of actually paying the judgment. If a railway company has entered into a contract with a telegraph company, whereby the latter is to put up poles and wires, and equip a telegraph along the main route of the railroad, and its branches, but the railroad company makes arrears in payments, and falls into the hands of a receiver, and the telegraph company claims the right to discontinue the contract if its claim is not paid, the receiver should be directed to pay the balance due the telegraph company where it, if not paid, would have a right to discontinue the contract, and the exercise of which right would entail great inconvenience, loss, and mischief upon the railroad, with a probable violation of the state statute forbidding the operation of a railroad without a telegraph line: *Newgass v. Atlantic etc. Ry. Co.*, 72 Fed. Rep. 712.

Statutes—Lien of Mechanics, Laborers, Materialmen, and Others.—A statute providing that no mortgage of the income, future earnings, or the rolling stock of a railroad corporation shall be valid against debts contracted in carrying on the business of a corporation, etc., does not give a prior lien to the holders of such claims, but merely prevents those claiming a prior lien under such mortgage from setting it up to defeat such claims. So, if a railroad corporation, whose property is heavily mortgaged, makes arrangements to operate its road in connection with other roads, the management of these roads being under the same general officers, although the business of each is kept separate, and sums of money are loaned by the corporations controlling the connecting lines to enable the indebted railroad corporation to pay its taxes, to pay its employés, and to pay bal-

ances due themselves, these loans are debts contracted in carrying on the business of the corporation, within the provisions of a statute providing that no mortgage on the income, future earnings, or rolling stock of a railroad shall be valid as against such debts: *Farmers' Loan etc. Co. v. Vicksburg etc. R. R. Co.*, 33 Fed. Rep. 778. A court is not authorized by statute, or otherwise, to award a lien superior to that of a mortgage, executed before the passage of such statute: *Foreman v. Central Trust Co.*, 71 Fed. Rep. 776. Compare *Central Trust Co. v. Louisville etc. Ry. Co.*, 70 Fed. Rep. 282. One who founds a claim for labor, material, or wages, etc., wholly upon a state statute, must prove, affirmatively, the existence and priority of his lien, in order to have it preferred over that of the first mortgage bondholders of a railroad corporation whose property is in the hands of a receiver: *Hassall v. Wilcox*, 130 U. S. 493. The claim of a telegraph company, for services rendered to a railway company, is a labor claim within the meaning of a statute giving to laborers' claims priority over mortgages, if recorded within six months after the claims mature: *Newgass v. Atlantic etc. Ry. Co.*, 72 Fed. Rep. 712.

Statutory liens should be paid before mortgage bonds: *Blair v. St. Louis etc. R. R. Co.*, 25 Fed. Rep. 232; *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705. A foreclosure sale of mortgaged railway property, in a federal court, does not bar the enforcement of judgments of state courts establishing statutory liens against the property, where the judgment creditors have sought to intervene in the foreclosure proceedings, but have had their petitions dismissed without prejudice, even though such judgments are recovered during the foreclosure suit, and while the property is in a receiver's hands, and without making him a party: *Blair v. Walker*, 26 Fed. Rep. 73. If the state has a lien, declared by express words of the statute to be prior and superior to all liens or encumbrances created by a railroad company, and all other claims existing or to exist against it, and the company executes a mortgage or deed of trust for the benefit of all its bondholders, and afterward makes default and becomes bankrupt, the holders of its indorsed bonds, which were issued and indorsed by the governor of the state as certain portions of the road were completed, are entitled to be subrogated to the statutory lien of the state, on a bill filed by the trustees to foreclose the deed of trust, and are entitled to be first paid out of the proceeds of the sale of the property: *Colt v. Barnes*, 64 Ala. 108.

As against a railway mortgage executed before a mechanic's lien exists, the mortgage generally takes precedence over the lien: *Coe v. New Jersey etc. Ry. Co.*, 31 N. J. Eq. 105; but where the railroad is incomplete when the mortgage is executed, a mechanic's lien takes precedence over the mortgage: *Meyer v. Hornby*, 101 U. S. 728; *Brooks v. Railway Co.*, 101 U. S. 443; *French v. Burlington etc. Ry. Co.*, 4 Dill. 570; *Meyer v. Construction Co.*, 100 U. S. 457. Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all encumbrances put on the property by mort-

gage, or otherwise, after the work was commenced; though the particular work for which the lien is claimed was not commenced until after the execution of the mortgage: *Meyer v. Construction Co.*, 100 U. S. 457; *French v. Burlington etc. Ry. Co.*, 4 Dill. 570; *Neilson v. Iowa Eastern Ry. Co.*, 44 Iowa, 71. If work has been done upon a railroad under contract, the company cannot, by the execution of a mortgage, and a sale thereunder, defeat the lien; but, as against such lien, the mortgage and sale are void: *Shamokin Valley etc. R. R. Co. v. Malone*, 85 Pa. St. 25; *Fox v. Seal*, 22 Wall. 424; *Tyrone etc. Ry. Co. v. Jones*, 79 Pa. St. 60. Compare *Turney v. Spartanburg etc. R. R. Co.*, 7 Fed. Rep. 429, where the court was of opinion that the statute upon which the claims were based did not apply to railroads. A mortgage executed by a railway company before it has acquired either the legal or the equitable title to land does not take precedence over a lien in favor of a mechanic, arising for labor done upon such land, or materials furnished after the execution of the mortgage, but before the company has acquired title to the land. The lien of the mechanic takes precedence over the mortgage encumbrance: *Botsford v. New Haven etc. R. R. Co.*, 41 Conn. 454. Those who sell land to a railroad company have an equitable lien superior to any mortgage the company can give: *State v. Anderson*, 91 U. S. 667. An investment company which furnishes the money for the construction of a railroad, taking the notes of the persons proposing to build it, guaranteed by an existing railroad company controlled by them, and to be secured by a mortgage to be executed by the proposed railroad company when incorporated, is to be regarded as a promoter and builder of the road, and is not entitled to have the mortgage declared a lien upon the franchises and property of the road constructed, superior to mechanics' liens arising out of its construction, when at the date of the execution and delivery of the mortgage the proposed railroad company has acquired no right of way or franchises, and has taken no steps toward their acquisition further than filing its articles of incorporation and naming its officers and directors, and the money has been paid over to the individual contracting parties then officers of the corporation, to be expended by them in the construction of the road, and the contracts for labor and material have been made by them in the name of the company: *Kilpatrick v. Kansas City etc. R. R. Co.*, 38 Neb. 620; 41 Am. St. Rep. 741.

If a railroad in the hands of a receiver is confessedly insolvent, the priority of claims for services rendered or materials furnished to keep the road in repair, or in running order, must, under statutes, be determined, to a great extent, by the language therein used. These statutes are so unlike in the different states, that it would be unprofitable to attempt to give them in detail, or to formulate, from them, a general rule. It may be said, however, that there should be a dividing line drawn between services rendered in the official and executive management and authority over the work of making repairs and running the road, and such laborers and employés as do

this work. The employers are excluded, the employes included. Hence, the claims of those who engage in manual labor in making repairs, or in operating the road, or who furnish materials to be used therein, such as ties, iron, lumber, wood, coal, oil, etc., are generally protected by statute, where one exists; but such protection is not extended to claims for the services of directors, cashiers, paymasters, or head of departments, nor to claims for rent of offices occupied by them, nor to claims for telegraphing ordered by them, nor to claims for the printing of tickets, bill heads, posters, time-tables, etc., and the materials used therein: *Poland v. Lamoille Valley R. R. Co.*, 52 Vt. 144, 180.

The main object of this note being to discuss the equitable ground upon which a receiver is bound to respond by applying net income of railroad and like property in payment of preferred debts, and to show what debts have, therefore, a priority over mortgages, we shall dismiss the statutory features of mechanics' and laborers' liens from further consideration. If supplies used for rebuilding bridges, building sidetracks, and in making repairs are furnished to a railroad company from time to time, under a continuous verbal contract made after default in the payment of a railway company's bonded interest, and which is not terminated until the appointment of a receiver, more than two years after the first supplies are furnished, the materialmen, notwithstanding the statute of frauds, are, under the circumstances, entitled to a judgment for the balance due them, and their claim is superior, in equity, to that of the mortgage creditors, for the amount due, on the earnings of the road: *Blair v. St. Louis etc. Ry. Co.*, 22 Fed. Rep. 769. If receivers of a railway company permit work on a building, which was in course of erection when the receivership commenced, but which was not covered by the mortgage, to continue without interruption, they may become liable to the contractor for the amount of his bill as a preferred claim, especially where the completion of the building was in furtherance of the interests of the road, and the claim was approved by the court; and the fact that the building is not covered by the mortgage renders it the more equitable that the proceeds of the sale under foreclosure should be applied to the payment of the cost of its construction: *Girard Ins. Co. v. Cooper*, 162 U. S. 529.

Damages for Injuries.—Claims for injuries, either to persons or property, incurred while a receiver is in control of railroad property are payable by him as other expenses of the management. In other words, when a railroad is in the hands of a receiver by virtue of the order of a court of competent jurisdiction, the claims arising out of the operation of the road by the receiver, whether under contract or for tort, have the right to payment out of the revenue accruing from the operation of the road superior to the lien of prior mortgage debts, and a claim for damages for injury to person or property is an expense of the operation of the road: *Stratton v. European etc. Ry.*, 76 Me. 269; *Houston etc. Ry. Co. v. Crawford*, 88 Tex. 277; 53 Am. St. Rep. 752; *Cowdrey v. Galveston etc. R. R. Co.*, 93 U. S. 352; *Cen-*

tral Trust Co. v. East Tennessee etc. Ry. Co., 70 Fed. Rep. 764; 69 Fed. Rep. 658; extended note to Farmers' Loan etc. Co. v. Kansas City etc. R. R. Co., 53 Fed. Rep. 195, on preferential indebtedness upon the foreclosure of railway mortgages, where a receiver is appointed; Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421; 18 Am. St. Rep. 60; Farmers' Loan etc. Co. v. Northern Pac. R. R. Co., 71 Fed. Rep. 245, 248; 74 Fed. Rep. 431, 433. Contra, Farmers' Loan etc. Co. v. Green Bay etc. Ry. Co., 45 Fed. Rep. 664; and compare Foreman v. Central Trust Co., 71 Fed. Rep. 776.

The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation, and with damages done to property during his management: Cowdrey v. Galveston etc. R. R. Co., 93 U. S. 352; or for damages to property by fire, communicated by a locomotive: Stratton v. European etc. Ry. Co., 76 Me. 269. A judgment against the company for damages for the loss of property, caused by the negligent omission of the railroad company to deliver goods promptly to the consignee, in consequence of which they were destroyed by a fire in the company's station, is one for damages done to property in the operation of the railroad within the meaning of a statute providing that no railroad company shall have power to give a mortgage valid as against a judgment for such cause: Central Trust Co. v. East Tennessee etc. Ry. Co., 70 Fed. Rep. 764. A claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating a railway is entitled to payment out of current receipts: Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421; 18 Am. St. Rep. 60; Houston etc. Ry. Co. v. Crawford, 88 Tex. 277; 53 Am. St. Rep. 752; and if such funds are invested in permanent improvements, and the road reverts without sale to the owner, the latter will be liable for such claims to the extent of the funds thus invested. This rule applies after a sale while the property is under the receiver's control, though the purchaser would not be liable for claims arising prior to the sale: Houston etc. Ry. Co. v. Crawford, 88 Tex. 277; 53 Am. St. Rep. 752; Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421; 18 Am. St. Rep. 60.

On the other hand, when a receiver of a railroad has been appointed in a suit for the foreclosure of a mortgage upon the road, and no order has been made, as a condition of such appointment, for the payment of claims for damages, a claim against the railroad company for damages, caused by its negligence in the operation of its road, subsequent to the mortgage and before the receivership, and whether reduced to judgment or not, is not entitled to payment by the receiver in preference to the mortgage debt: Farmers' Loan etc. Co. v. Northern Pac. R. R. Co., 74 Fed. Rep. 431; Farmers' Loan etc. Co. v. Detroit etc. R. R. Co., 71 Fed. Rep. 29; St. Louis Trust Co. v. Riley, 70 Fed. Rep. 32. In Farmers' Loan etc. Co. v. Northern Pac. R. R. Co., 74 Fed. Rep. 431, Gilbert, circuit judge, very clearly and forcibly said:

"The judgment is based upon the negligent act of the company in

killing stock belonging to the petitioner while operating its road, about two months prior to the date when the road went into the hands of receivers. The question is presented whether or not such a claim is entitled to preference over the mortgage liens upon the road, which were made and recorded prior to the date of the act of negligence on which the claim is based.

"Certain classes of debts of railroad companies, which were incurred before the road went into receivership have been held by the courts to be entitled to payment in preference to prior mortgage liens. They have been so paid upon two distinct grounds: First, it is held that the court appointing the receiver is vested with discretionary power to make such order concerning the payment of existing liabilities as shall be equitable and just, as a condition precedent to assuming control over the property at the suit of the lienholder, and that the court is not without power, in such a case, to require that the receiver pay claims other than those that had their origin in contracts for the supply, equipment, betterment, management, or maintenance of the road, and that there might even be included in such order the payment of claims that arose from the negligent acts of the company: *Fosdick v. Schall*, 99 U. S. 235; *Union Trust Co. v. Souther*, 107 U. S. 591; *Farmers' Loan & Trust Co. v. Kansas City etc. R. R. Co.*, 53 Fed. Rep. 182. In the second place, it has been held that certain debts contracted by the railroad company within a reasonable time prior to the appointment of the receiver are payable by him out of the income, for the reason that they belong to the class of claims known as preferential. Their allowance and payment does not depend upon the authority of an order of court made at the inception of the receivership, but upon their inherently equitable nature, arising from the fact that they represent supplies furnished to the road for its operation or equipment, or the wages due its operatives, whose assistance was indispensable to its maintenance as a going concern, or the balances due from the road to connecting roads.

"In so preferring such claims, the courts have recognized the fact that a mortgage upon a railroad in some respects differs from the ordinary mortgage upon real estate; that the railroad company, having received its franchises from the public, and being, in a sense, a public instrument for the carriage of freight, passengers, and mail, owes duties to the public, one of which is, that its operation be continuous and uninterrupted; and that he who loans his money upon a railroad mortgage must be presumed to be aware of that fact, and to take his security with notice that its value may depend upon the continued use of the property, and that, in order to maintain its value and preserve its franchises, there must be a continuous supply of funds, labor, and material furnished upon its credit; and the courts have sustained the claims of such creditors, and have ordered their payment by the receiver upon the ground that the mortgagee, while his claim is anterior in time to the claims of such creditors,

has nevertheless received the benefit of the supplies, etc., by means of which his security has been preserved and protected, or upon the ground that his lien upon the net earnings contemplates their payment.

"No such equity presents itself in the case of one whose claim is based upon the negligent act of the corporation. Such claims for injuries occurring under the receiver's own management are paid, it is true, in preference to the mortgage debt, not for the reason of their preferential nature, nor because of any superior equity in their favor over claims for damages which arose before the receiver was appointed, but because they are liabilities which were incurred by the receiver in the course of his own operation of the road, and are payable by him as other expenses of the management. But he who has a claim of damages for a negligent act of the railroad company prior to the receivership has no recognized equitable ground for demanding a preferred payment. He has done no act by which either the railroad company or the mortgagee has profited, nor has he surrendered property which has in any way, inured to their benefit.

"Accidents, it is true, are liable to occur, and do occur, in the operation of all railroads, and it is impossible to wholly avoid them; but it cannot be said that they are necessary to the road's existence in the same sense that supplies are necessary. Indeed, the right to recover damages on account of such acts is predicated upon the fact that the acts were not necessary to the proper management of the road. He who lends his money on railroad security undoubtedly does so with the contingency that the company may require supplies and equipment, and that, if it become necessary for the protection of the security that a court of chancery shall assume control over the mortgaged property, such claims may intervene between him and the payment of his lien. He incurs, also, the risk of the negligent conduct of the railroad company, so far as it may directly affect the condition or value of the property. But it cannot be said, and no court has held, that he assumes the risk of the negligence of the railroad company whereby injury results to third persons, and that he, in effect, becomes responsible for the torts which such railroad company may commit against others.

"The doctrine of the preferential claim is itself an innovation upon the law of liens. It is a recognition of the peculiar nature of the railroad mortgage, and arises either from the consideration of the fact that the mortgage creates a lien upon the net income, or it grows out of the necessity of the case—that is, the necessity for the continued operation, equipment, and preservation of the road. While there are cogent reasons that may be urged in favor of the proposition that the lender of money upon railroad security, having furnished, in the first instance, the fund out of which the road is built, and without which it could not have been created, and having thereby aided in putting into operation a powerful and dangerous agency through the imperfections of which injury must result to

others, and having taken a lien upon the road, its equipment and its earnings, and having become, in a sense, a party in interest with the railroad company in its operation and maintenance, should, in equity, hold a lien second to him who is injured by the railroad company in its ordinary course of business, thus following by analogy the law maritime, the courts are, nevertheless, not justified in departing from the established precedents which govern property rights, and in violating the obligation of contracts by making a new rule in cases of this kind.

"In view of the settled maxims of equity and their application as found in the decisions of the courts, no satisfactory reason presents itself on which an exception, in such a case, can be based, or upon which it can be held that he who loans upon railroad security assumes the risk of loss from the negligent act of the railroad company to strangers more than that he who loans upon a mortgage on real estate assumes the risk of the owner's negligent act to his neighbors, or why, in the one case more than in the other, the mortgage lien should be postponed to the demand of the injured person for damages. The fact that a receiver has been appointed, in any case, does not, of itself, create new equities in favor of creditors." Compare the remarks of District Judge Hanford in *Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.*, 71 Fed. Rep. 245, 247, to the effect that a judgment for personal injuries to a passenger or employé, or for damage to merchandise in transit, is an operating expense, and should be paid the same as any other current expense.

A railroad company cannot evade its legal liability for injuries caused by the negligent operation of its road by voluntarily conveying and surrendering indefinitely to mortgage trustees of its own selection, its road and franchises, where there is no statutory provision authorizing or regulating the transfer and surrender: *Naglee v. Alexandria etc. Ry. Co.*, 83 Va. 707; 5 Am. St. Rep. 308. The legislature has power to prohibit a railroad corporation from making a mortgage which shall have priority over any valid judgment, decree, or execution, "for timber furnished, and work and labor done on, or for damages done to, persons and property" in the operation of its road: *Frazier v. Railway Co.*, 88 Tenn. 138. See, also, *Southern Ry. Co. v. Bouknight*, 70 Fed. Rep. 442.

Judgment Liens—Priority.—A judgment against a receiver appointed under proceedings to foreclose a railroad mortgage does not have priority over the mortgage debt, unless it is for a debt constituting a part of the operating expense of the road. But a prior mortgage of railway property is not valid as against a subsequent judgment creditor who, but for the receivership obtained in a suit to foreclose the mortgages, might have made a lawful, valid levy on the equipment of the road: *Coe v. New Jersey etc. Ry. Co.*, 31 N. J. Eq. 105; *Eells v. Johann*, 27 Fed. Rep. 327. In *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, a receiver of a railroad company was appointed at the suit of a judgment creditor. Upon the subsequent discharge of the receiver, a balance of net earnings amounting to

two hundred and eighteen thousand dollars remained in his hands, and, in a contest as to the first right to be paid out of this balance, it was held that the judgment creditor was entitled to priority over trustees under a mortgage who intervened individually, upon the ground that the latter could not, upon recognized principles of equity deprive the creditor at whose instance, and for whose benefit the receiver was appointed, of his priority of right arising from the institution of suit for the purpose of reaching the income of the debtor's property. Under the Texas statute, the court may give to debts and liabilities arising during the receivership a preference lien on the corpus of the property involved prior to that of a first mortgage lien thereon: *Ellis v. Vernon Ice etc. Co.*, 4 Tex. Civ. App. 66. But the court has not the right to thus subordinate a fixed lien to an unsecured debt created prior to the receivership, as the statute limits this right to judgments for causes of action arising during the receivership; and claims prior thereto are restricted to a preference lien on the moneys coming to the receiver as the earnings of the property in his hands: *Ellis v. Vernon Ice. etc. Co.*, 4 Tex. Civ. App. 66. A statute in force respecting the lien of a judgment, when a railway mortgage is given, enters into the contract, and is binding on the mortgagee and purchaser. A provision in such a statute, that the lien of a judgment for personal injuries shall relate back to the date of the injury, is intended only to fix priorities between conflicting liens, and does not operate on the preference over mortgages specifically created as to such judgments by the same statute: *Southern Ry. Co. v. Bouknight*, 70 Fed. Rep. 442. The Tennessee statute providing that no railroad company shall have power to create any mortgage which shall be valid against judgments and decrees for timber furnished, work and labor done, or damages done to persons or property, is limited by its express terms to judgments obtained on causes of action arising within that state. So, where a mortgage executed by a Tennessee railroad corporation, whose road extends into the state of Georgia, is in course of foreclosure, and ancillary proceedings are had in the federal circuit court of Georgia, the question as to the priority of judgments filed in that court, and recovered in Georgia, on causes of action there arising, over the lien of the mortgage, must be determined by the laws of Georgia, and not by the laws of Tennessee: *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 69 Fed. Rep. 658. That the lien of judgments recovered in Georgia, on causes of action arising therein, against a railroad company, is subordinate to the lien of a mortgage filed in the state prior to the time the causes of action arose, see *Central Trust Co. v. East Tennessee etc. Ry. Co.*, 69 Fed. Rep. 658.

Diversion and Restoration—Corpus of Property.—When a railroad is in the hands of a receiver and there has been a diversion of current income from the payment of current or preferred debts to the payment of interest on a mortgage, or in making permanent improvements, there should be a restoration to the extent of such diversion, it being in derogation of the rights of those entitled to the

fund; and if such restoration cannot be made from the income, the court should order the amount necessary to be charged upon the corpus of the mortgaged property, and to be restored from the proceeds of its sale: *Union Trust Co. v. Morrison*, 125 U. S. 591; *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434; *Burnham v. Bowen*, 111 U. S. 776; *Fosdick v. Schall*, 99 U. S. 235; *Ames v. Union Pac. Ry. Co.*, 74 Fed. Rep. 335; *Wood v. New York etc. R. R. Co.*, 70 Fed. Rep. 741; *Bound v. South Carolina Ry. Co.*, 58 Fed. Rep. 473; *Finance Co. v. Charleston etc. R. R. Co.*, 52 Fed. Rep. 524; 49 Fed. Rep. 693; 48 Fed. Rep. 188; *Calhoun v. St. Louis etc. Ry. Co.*, 14 Fed. Rep. 9; *Houston etc. Ry. Co. v. Crawford*, 88 Tex. 277; 53 Am. St. Rep. 752; *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60; *McIlhenny v. Binz*, 80 Tex. 1; 26 Am. St. Rep. 705; *Stratton v. European etc. Ry.*, 76 Me. 269; *Shepherd v. Pepper*, 133 U. S. 626; *Vicksburg etc. R. R. Co. v. McCutchen*, 52 Miss. 645; *Jones v. Central Trust Co.*, 73 Fed. Rep. 568; *Ellis v. Vernon Ice etc. Co.*, 86 Tex. 109; *Clark v. Central R. R. etc. Co.*, 66 Fed. Rep. 803; *Blair v. St. Louis etc. Co.*, 25 Fed. Rep. 232. If a strict foreclosure is had the amount should be charged upon income after foreclosure: *Burnham v. Bowen*, 111 U. S. 776. Compare *Hand v. Savannah etc. R. R. Co.*, 17 S. C. 219; *Farmers' etc. Bank v. Waco etc. Ry. Co.* (Tex. Civ. App.), decided June 3, 1896, as not in line with the above cases. The case last cited holds that, if a railroad company is in the hands of a receiver, though at the instance of mortgage holders, the court has no power to appropriate the corpus of the property to the payment of claims for operating expenses in preference to prior mortgage debts, where, at the time the mortgage was executed, there was no statute giving such claims a prior lien on the corpus of the property. It is error, of course, upon the sale of a railroad on foreclosure, to direct payment of claims for supplies furnished prior to the receivership out of the purchase money, if no provision was made for such payment when the receiver was appointed, and there is no evidence that current earnings, before or after his appointment, were diverted to paying interest on the bonded debt: *Cutting v. Tavares etc. R. R. Co.*, 61 Fed. Rep. 150.

Receivers' Certificates are certificates of indebtedness issued by receivers in possession of property, and are a first lien upon such property: *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434. They are in the nature of a call loan: *Mercantile Trust Co. v. Kanawha etc. Ry. Co.*, 50 Fed. Rep. 874. The court may order them to be issued for various classes of debts, and when they are issued for preferred claims on the property of a railway company which is in the hands of a receiver, they constitute a lien superior to prior mortgages according to the principles above announced in this note: *Central Trust Co. v. Sheffield etc. Ry. Co.*, 44 Fed. Rep. 526; *Kneeland v. Luce*, 141 U. S. 491; *Farmers' Loan etc. Co.*, 129 U. S. 206; *Mercantile Trust Co. v. Kanawha etc. Ry. Co.*, 50 Fed. Rep. 874; *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434; *Metropolitan Trust Co. v. Tonawanda etc. R. R. Co.*, 40 Hun, 80. Receivers' certificates

are issued subject to prior and existing liens, and, when given for borrowed money, the holders must be deemed to have taken them subject to the rights of parties who have prior liens upon the property. The court declares receivers' certificates to be superior or subordinate to prior liens, such as mortgages, etc., as equity may require: *Hervey v. Illinois etc. Ry. Co.*, 28 Fed. Rep. 169.

Possession by Mortgagee.—A mortgagee of railway property out of possession is not entitled to earnings and profits until he has asserted his rights under the mortgage, as by filing a bill of foreclosure, and demanding a surrender of the possession: *United States Trust Co. v. Wabash etc. Ry. Co.*, 150 U. S. 287; *Seney v. Wabash etc. Ry. Co.*, 150 U. S. 310; *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361; *Freedman's Saving etc. Co. v. Shepherd*, 127 U. S. 494; *Central Trust Co. v. Wabash etc. Ry. Co.*, 30 Fed. Rep. 332; *Poland v. Lamolille Valley R. R. Co.*, 52 Vt. 144. Until the mortgagee takes possession, his claim to the earnings and income on hand at the time of filing his bill must be postponed to that of an execution creditor: *American Bridge Co. v. Heidelberg*, 94 U. S. 798. A mortgage of a railroad, covering the present and subsequently acquired property of the company, executed to secure the payment of its bonds is, while the company retains possession, a prior lien upon the net earnings of the road: *Hale v. Frost*, 99 U. S. 389.

Private Corporations owe no duty to the public, and their continued operation is not a matter of public concern. Hence, it is only against railroad mortgages that the federal courts have sustained preferred claims for particular classes of indebtedness, and given them priority over the mortgages, and then only upon principles having no application to a mortgage executed by a private corporation owing no duty to the public: *Farmers' Loan etc. Co. v. Grape Creek Coal Co.*, 50 Fed. Rep. 481; *Hooper v. Central Trust Co.*, 81 Md. 559, 591. In *Wood v. Guarantee Trust Co.*, 128 U. S. 416, 421, the court said: "The doctrine of *Fosdick v. Schall*, 99 U. S. 235, has never yet been applied in any case, except that of a railroad." If the property of a private corporation has been placed in the hands of a receiver, all expenses for safekeeping and preservation are properly payable out of the income, or if there is none, then out of the proceeds of the corpus of the estate when sold. But it does not follow that a court of equity, in such instances, has, in the exercise of such authority, power to create liens through the medium of receivers' certificates, which will take priority over existing antecedent liens: *Hooper v. Central Trust Co.*, 81 Md. 559, 591. We find, however, a late North Carolina case, standing isolated and alone, so far as we can see, and which is apparently the pioneer in applying the doctrines of equity we have been discussing to the mortgage of a private corporation. This case is *Pocohontas Coal Co. v. Henderson Electric etc. Power Co.*, 118 N. C. 232, holding that the debts of a private corporation, such as an electric light and power company, for labor performed, or materials furnished, to keep it a "going concern," have priority

over a prior recorded mortgage, though the labor done or the materials furnished do not add to the plant, or enhance its value; and that coal furnished to, and used by, such a corporation to enable it to operate its plant is "material furnished" within the meaning of the statute creating a lien as a security for certain debts.

JONES v. STATE.

[97 GEORGIA, 430.]

CHEATING AND SWINDLING.—If a twenty dollar gold piece is intrusted to one ignorant of its value for the purpose of going to market to buy a specific article, worth only twenty-five cents, and the seller, perceiving that the purchaser believes the coin to be a silver dollar, encourages that belief by his persuasive silence and equivocal assent, retains the coin, and returns only seventy-five cents in change, the latter, having used "deceitful means" and employed an "artful practice," is guilty of being a common cheat and swindler.

Accusation of cheating and swindling.

M. G. Bayne, for the plaintiff in error.

W. H. Felton, Jr., solicitor general, for the defendant in error.

430 LUMPKIN, J. A little girl was intrusted with a twenty dollar gold piece for the purpose of going to the market, buying a chicken, and returning with it and the change. The owner of the coin, through inadvertence, supposed it was a silver dollar, and the little girl was ignorant of its real value.

From the evidence for the state, which the jury evidently believed, it further appeared that the little girl went to the market, purchased a chicken of the accused at the price of twenty-five cents, and gave him the coin. He took it and said: "Do you want me to change all this money?" to which she replied: "It is a dollar." He turned to the light, examined the coin again, and gave a guttural sound, expressive of assent and most probably intended to induce the child to remain in the belief that the coin was in fact a silver dollar. At any rate, he returned her in change only seventy-five cents, which would, of course, have been the proper amount had the coin been only a dollar.

The conduct of the accused was undoubtedly fraudulent and criminal. The question is, Was it larceny, or cheating and swindling? He was indicted for, and convicted of, the latter offense; and, in our opinion, this was legal and proper. Though ignorant of its true value, the girl intended **431** to pay, and did in fact pay, the twenty dollar gold piece to the accused. She part-

ed with it voluntarily, and up to this point, no fraud, deception, or dishonesty of any kind had been practiced upon her by the accused. He was rightly in possession of the coin, and had an inchoate title to it which would immediately have become complete and perfect if he had returned the proper amount of change, as he ought to have done. Certainly, it was not delivered to him upon a trust of any description, nor did he obtain possession of it against the girl's consent. If he had handed her nineteen dollars and seventy-five cents, her ignorance of the value of the coin she had paid to him would have been of no consequence, and the whole transaction would have been perfectly legal and regular. His fraudulent conduct began when he ascertained that the girl believed the coin to be a silver dollar. The artful practice and the deceitful means which he employed consisted in adopting the necessary precautions to keep her in this belief, and thus enable him to obtain the valuable coin and satisfy her with the inadequate sum given back in change. His persuasive silence and equivocal assent to the girl's misstatement that the coin was only a dollar, while a less tangible form of deceitful practice than a more active form of artifice would have been, were none the less effectual in the accomplishment of his fraudulent design—perhaps they were the most effectual means he could have employed, because allaying suspicion on the part of the girl was essential to the success of his dishonest purpose. The ingenious cheat and swindler cannot escape punishment merely because he invents and employs less clumsy means of deceit, and more cunningly pursues his artful practices, than is usually the case with less adept and skillful members of his craft.

For the reasons above stated, the offense cannot be larceny; and if this be true, it falls directly within the description embraced in section 4595 of the code, defining the offense of being a common cheat and swindler. He ⁴³² certainly used "deceitful means" and employed an "artful practice" by which the girl in question, representing the owner of the coin, was defrauded and cheated. The case of *Crofton v. State*, 79 Ga. 584, is altogether different. There, it appears that a newsboy intrusted the accused with a newspaper valued at five cents, and ninety-five cents in change, for the purpose of procuring and bringing back to him a dollar. It was a clear case of trust on the one side, and conversion of the property on the other, the title to which the newsboy never intended to pass to the accused, and even the possession of which was surrendered for a specified purpose only.

Judgment affirmed.

LARCENY IN MAKING CHANGE.—The offense of appropriating a part, or the whole, of money, which has been handed to one to make change, is generally denominated larceny: See monographic note to *State v. Homes*, 57 Am. Dec. 279, on larceny; *State v. Anderson*, 25 Minn. 66; 33 Am. Rep. 455; *Walters v. State*, 17 Tex. App. 226; 50 Am. Rep. 128. Section 4595 of the Georgia code provides, however, that any person using any "deceitful means" or "artful practice" other than those which are mentioned and provided against in that code, by which an individual, or the public, is defrauded and cheated, shall be deemed a common cheat and swindler, and, on conviction, be punished as therein provided.

GARDNER v. WAYCROSS AIR-LINE RAILROAD CO.

[97 GEORGIA, 482.]

TRIAL—NONSUIT—NEGLIGENT INJURY TO PASSENGER ON RAILROAD—QUESTION FOR JURY.—If a passenger on a train about to start, wishing to see the conductor on business connected with his journey, goes into the baggage-car for that purpose, and, while there, is thrown down and injured by the sudden bumping of cars, it is error to nonsuit him, in an action for damages, as the questions whether he, in view of all the evidence submitted, was rightfully in the baggage-car, whether the injury resulted from the company's negligence, and whether it might have been avoided by the exercise of ordinary diligence on his part, should be submitted to the jury.

RAILROADS — PASSENGERS, WHO ARE — PURCHASE OF TICKET.—A person who is going a short distance and gets on a train about to start from a station at which there is no ticket office is a passenger, though he has not purchased a ticket, if he has money with him with which to buy a ticket.

RAILROADS—PASSENGERS—CARE REQUIRED.—A railroad company is under the duty of exercising extraordinary diligence for the safety of its passengers.

Action for damages.

Hitch & Myers, for the plaintiff in error.

John C. McDonald, for the defendant in error.

483 **SIMMONS, C. J.** Gardner sued the railroad company for damages from personal injuries. The declaration is set out in *Gardner v. Waycross Air Line R. R. Co.*, 94 Ga. 538, the case having come to this court upon exceptions to a judgment sustaining a general demurrer to the declaration and dismissing the action. It was then held that the declaration stated a cause of action, and the judgment of the court below was reversed. The plaintiff now excepts to the granting of a nonsuit.

It appears from the evidence that while the defendant's train was at Waycross, at the usual place of departure, the plaintiff, intending to take passage on the train, entered shortly before the

time of leaving, a car in which there were other passengers, and took his seat. He had not purchased a ticket, there being no ticket office at the station, but he had the money with him with which to pay his fare. The car in which he was seated contained a baggage compartment, separated from that part of the car in which the passengers were by a partition, in which there was a door. He was going a short distance, and desired to see the conductor, who was in the baggage compartment, in order to explain to him, before the car started, where he wished to go, and get information in regard to getting off. He had but one leg, and did not wish to go to the conductor after the train was in motion. The train was then waiting for passengers who were expected to arrive soon on another train, and he feared there would be a "rush" of passengers and he would not have time to see the conductor after the train started. There was a notice over the door of the baggage compartment of "No Admittance," but the plaintiff did not see it. The door was standing open. The plaintiff entered the baggage compartment and was standing there getting the information he desired from the conductor, when the car they were in was suddenly struck by another car. The lick was unusually hard, and caused the plaintiff to fall, thereby sustaining severe ⁴⁸⁴ injuries to his person. The shock also caused the conductor to fall. The plaintiff testified that he had before ridden on that railroad and in that car, but had never before experienced such a bump on that railroad or on any other. The conductor testified that the car that caused the shock was a box-car which was being coupled to the car they were in; and that generally the bumper of a passenger-car was higher than that of a freight-car, and, in order to have the springs work, it was necessary to hit them a hard lick. Before the plaintiff went into the baggage compartment, the conductor had been "drilling" cars, and the plaintiff, before going to the conductor, looked out of the car and saw no "drilling" being done, and that everything was still. He supposed he had been in the baggage compartment about three minutes when the shock occurred. There was evidence as to the extent of his injuries, and as to his earnings, age, diminution of capacity to labor, etc.

We think the court erred in granting a nonsuit. The plaintiff, although he had not purchased a ticket, sustained the relation of a passenger, and the defendant was under the duty of exercising extraordinary diligence for his safety: *Chattanooga etc. R. R. Co. v. Huggins*, 89 Ga. 495, (5), (6), 503. Such diligence must be exercised by a railway company whenever it undertakes to cou-

ple cars of a train having in it passengers to be carried by the train. The plaintiff having shown that he was injured by reason of the manner in which the cars came together, the presumption was, that the injury was occasioned by the defendant's negligence, and it was incumbent upon the defendant to show that it was without fault, unless the evidence showed that the plaintiff was at fault himself to the extent of failing to exercise ordinary care for his own safety. Under the evidence, we think the question whether the plaintiff was rightfully in the baggage compartment or not, and whether or not the injury ⁴⁸⁵ might have been avoided by the exercise of ordinary diligence on his part, as well as the question whether the injury resulted from the negligence of the defendant, were questions for determination by the jury, and not for final solution by the trial judge upon a motion for nonsuit: See *Cotchett v. Savannah etc. Ry. Co.*, 84 Ga. 687.

Judgment reversed.

TRIAL—NONSUIT—NEGLIGENCE—JURY.—If the facts and inferences, in a case involving negligence, are in dispute, a nonsuit should not be granted: *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62; 7 Am. St. Rep. 837; *Vannatta v. Central R. R. Co.*, 154 Pa. St. 262; 35 Am. St. Rep. 823. A nonsuit should not be granted if there is substantial evidence produced by the plaintiff in support of his case which should be weighed and considered by the jury: *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St. Rep. 320. The question whether or not the testimony adduced is sufficient to prove negligence is exclusively to be determined by the jury: *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815; *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717. What is contributory negligence is generally a question for the jury to determine from all the facts and circumstances of the particular case, and only in rare cases is the court justified in withdrawing this question from the jury and granting a nonsuit: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799; *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905; *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403.

RAILROADS—PASSENGERS—PURCHASE OF TICKET.—Actual payment of fare is not essential to the status of a passenger on a railway train: *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17; *Poole v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289.

RAILROADS—CARE REQUIRED TOWARD PASSENGERS.—A railway company must exercise the highest degree of care and diligence for the safety of its passengers: *Ohio Valley Ry. Co. v. Watson*, 93 Ky. 654; 40 Am. St. Rep. 211; note to *Texas etc. Ry. Co. v. Miller*; 23 Am. St. Rep. 315; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 438; 22 Am. St. Rep. 781.

HUNTER v. WAKEFIELD.

[97 GEORGIA, 543.]

JOINT LIABILITY—LIBEL—AMOUNT OF RECOVERY.—If the plaintiff, in an action for libel against several joint defendants, recovers at all, the same amount must be awarded against all of the defendants found liable, and not a different sum against each.

NEW TRIAL—JOINT LIABILITY—LIBEL—PARTIES TO BILL OF EXCEPTIONS.—If, in an action for libel against several joint defendants, there has been found a verdict for the plaintiff against some only of the defendants, and a verdict in favor of the other defendants, there can be no new trial between the plaintiff and the latter alone, but, if granted at all, it must be as to all the parties. Hence, all of the defendants below are necessary parties to a bill of exceptions sued out by the plaintiff for the purpose of obtaining a new trial, and, if some of them are not made parties, the writ of error must be dismissed.

Motion to dismiss a writ of error.

Goodwin & Westmoreland, for the plaintiff in error.

Marshall J. Clarke, for the defendants in error.

544 LUMPKIN, J. An action for a libel was brought by Hunter against Hagler & Co. (a firm composed of H. A. Hagler and Mattie Hagler), Henry D. Wakefield, and the Atlanta Newspaper Union, a corporation. Under the charge of the court, a verdict was rendered against Hagler & Co., of which they did not complain. The court directed a verdict in favor of the other defendants, and to this the plaintiff excepted. Hagler & Co. were neither made parties to, nor served with, the bill of exceptions.

Upon the call of the case in this court, a motion was made to dismiss the writ of error, on the ground that H. A. Hagler and Mattie Hagler were necessary parties to the bill of exceptions, but had not in fact been made parties, nor served. In support of this motion, it was urged that the only relief possible under the bill of exceptions would be the granting of a new trial to the plaintiff in error as against Wakefield and the Atlanta Newspaper Union, and that the court could not grant this relief because it could not disturb the verdict as to Hagler & Co., they not having moved for a new trial and not being now before the court. This contention was based upon the proposition that it would be necessary to set aside the verdict as to all the defendants below, if set aside as to any of them; for the reason that the law requires that, in an action for libel, the same amount must be found against all the defendants, and not a different sum as against each. We think the motion to dismiss was well taken.

In *McCalla v. Shaw*, 72 Ga. 458, it was held that **545** where

two persons were sued jointly for a malicious arrest, the act on which the suit was predicated being the joint act of the two, each was responsible for the entire recovery; and consequently, a verdict for three hundred dollars against one of them, and one hundred dollars against the other, was illegal. It was further held in that case that, a new trial having been granted to that one of the defendants against whom the jury found one hundred dollars, and the liability of the two being the same, the other defendant was also entitled to a new trial; and that section 3075 of the code, providing for the apportionment of damages by the jury in an action against several trespassers sued jointly, referred to trespasses on property, and not to actions for personal torts. The principle of that case controls the question in hand. Applying the rule there announced, it will be seen that where a verdict in a case of personal tort has been found for the plaintiff against some only of several joint defendants, and the plaintiff moves for a new trial against those of the defendants as to whom he failed to recover, if his motion is granted at all, the verdict in his favor against those of the defendants who were found liable must necessarily be set aside, for unless this be done, there might, upon a subsequent trial, be a finding for the plaintiff for a sum totally different from that already found, and thus there would result a recovery in one amount against some of the defendants, and a recovery in quite a different amount as against others of them. This would be directly contrary to the law as above announced.

In the present case, it is obvious that the verdict which the plaintiff obtained in the court below cannot be set aside, as the two defendants against whom it was rendered are not before this court, and no judgment we might render could in any way disturb that verdict, so far as they are concerned.

Writ of error dismissed.

LIBEL—JOINT LIABILITY.—All persons are liable who engage in publishing or circulating a libel; and by reason of the doctrine of the several liability of tort feorsors, the remedy may be pursued against one or more of those guilty of the wrong: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75. But while a joint action may be maintained for the joint publication of a libel (*Webb v. Cecil*, 9 B. Mon. 198; 48 Am. Dec. 423), the plaintiff can have but one satisfaction: *Thomas v. Rumsey*, 6 Johns. 26.

FIDELITY & CASUALTY COMPANY v. GATE CITY NATIONAL BANK.

[97 GEORGIA, 634.]

INSURANCE—SURETYSHIP—FRAUD OR DISHONESTY OF EMPLOYÉ.—If a fidelity and casualty company binds itself to make good to a bank, to a specified extent, such pecuniary loss as it may sustain by reason of the fraud or dishonesty of an employé named, in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer," and he is afterward, during the period covered by the contract, appointed assistant cashier, but in that capacity brings loss to the bank, through his fraud or dishonesty, the company is as much surety for him in the latter capacity as in the former, and must make good to the bank its losses sustained through the acts of its assistant cashier.

INSURANCE—SURETYSHIP—FRAUD OR DISHONESTY OF EMPLOYÉ—IMPUTING KNOWLEDGE TO EMPLOYER—CONSTRUCTIVE NOTICE.—Although a contract, binding a fidelity and casualty company to make good to a bank, to a specified extent, such pecuniary loss as it may sustain by reason of the fraud or dishonesty of its assistant cashier, may require the bank, upon discovering him to be untrustworthy, to give prompt notice thereof to the company, yet, where there is nothing in the contract requiring the bank to exercise any degree of diligence in watching or inquiring into his actions, to save the company from loss through his misconduct, the knowledge of the bank's cashier, of fraud or dishonesty on the part of the assistant cashier, or of any act done by him involving a loss to the company of more than one hundred dollars, is not imputable to the bank itself. The doctrine of constructive notice has no application to such a transaction, and the bank is bound to impart only actual knowledge on its part.

PLEADING—INSURANCE AGAINST FRAUD OR DISHONESTY OF EMPLOYÉ—PLEA, SUFFICIENCY OF.—If, in an action by a bank upon a contract by which a fidelity and casualty company binds itself to make good to the bank, to a specified amount, such pecuniary loss as it may sustain by reason of the fraud or dishonesty of its assistant cashier, the defendant alleges, by way of amendment to his plea, that the employé had, within the knowledge of the bank, been guilty of a specified default, such amendment should be stricken on demurrer, as it is not legally complete without a further allegation that the plaintiff had failed to duly notify the defendant of the default in question.

PLEADING—INSURANCE AGAINST FRAUD OR DISHONESTY OF EMPLOYÉ—FATAL VARIANCE BETWEEN ALLEGATA AND PROBATA—NONSUIT.—If the contract, whereby a fidelity and casualty company insures a bank against the default of an employé, stipulates for proof of loss satisfactory to the company's officers, and requires full particulars of any claim arising upon the contract to be given in writing to the secretary of the company, within a specified time; and the declaration, in a suit upon the contract, alleges a compliance with these terms, but does not allege any waiver of the requisite proof of loss; and the evidence does not show that proof of loss was furnished; there is a fatal variance between the allegata and the probata, and it is error to refuse a nonsuit, even if evidence was introduced tending to show that the defendant had waived such proof of loss, as this would not sustain an allegation that the bank had furnished the proof of loss stipulated for by the contract.

Action on bond.

John L. Hopkins & Sons, for the plaintiff in error.

Dorsey, Brewster & Howell, for the defendant in error.

⁶³⁶ LUMPKIN, J. In view of what we consider the controlling questions in this case, it is not essential to deal specially with the numerous assignments of error contained in the record, and we shall, therefore, confine our remarks to the points upon which we have found it necessary to rule.

1. The Fidelity and Casualty Company (to which we shall hereinafter refer as the "company") undertook by its bond to make good to the Gate City National Bank of Atlanta (which will hereinafter be called the "bank,") such pecuniary loss, not exceeding ten thousand dollars, as it might sustain by reason of the fraud or dishonesty of Lewis Redwine in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer." He was afterward appointed assistant cashier, and, as such, was guilty of conduct which caused loss to the bank in an amount far exceeding the face of the company's bond. One of the questions for decision is, whether or not the company was surety for him in the latter capacity. In view of the comprehensiveness of the above quoted language, it would be difficult to hold it was not. He was certainly appointed, subsequently to the execution of the bond, to the office of assistant cashier; as such had duties to perform in his employer's service, and by a violation of those duties brought loss to his master. We think the plain language of the contract covers the precise state of facts which arose, and that the company is as much bound to answer to the bank for the consequences of Redwine's dishonesty in the latter capacity as in the former.

2. The main question in the case is, whether or not, under the stipulations expressed in the contract, the knowledge of the bank's cashier of fraud or dishonesty on the part of Redwine, or of any act done by him involving a loss to the company of more than one hundred dollars, was imputable to the bank itself. This case does not fall within the general ⁶³⁷ rule applicable to stipulations expressed in the contract, the knowledge of the bank's business is necessarily intrusted to its subordinate officials or servants, and in a large number of instances it will, upon the doctrine of constructive notice, be held to know what comes to their knowledge. This rule is founded upon necessity, and has for its object the protection of those who deal with and trust the bank.

The transaction out of which this bond grew was of an altogether different kind from those usually occurring between a bank and its customers. The contract was not made for the purpose of protecting the company in any dealings it might have with the bank; but, on the contrary, the company undertook to protect the bank in the matter of delegating some of the duties it owed to others to Redwine for performance in its behalf. In other words, the company agreed to save the bank from loss, to a limited extent, by reason of its thus trusting Redwine. As naturally incident to a contract of this nature, the company stipulated that the bank should gain no benefit thereunder if it continued in its service an employé known to be unworthy of trust, without prompt notice to the company after he had been discovered by the bank to be untrustworthy. There is not a syllable in the contract, however, bearing the construction that the bank should exercise any degree of diligence in inquiring into or supervising the conduct of Redwine, in order that the company might be saved from loss through his misconduct. The bank did not undertake to exercise reasonable care and diligence to find out if Redwine had become untrustworthy; but, as to this matter, the company, in effect, invited the bank to repose in peace; for it guaranteed that Redwine would remain honest and faithful. Only after knowledge had actually come to the bank that he was, or had become, otherwise, was it under any duty to the company; and then it was only required to immediately notify the company of what it had ascertained. This bank, it seems, was conducting ⁶³⁸ its business in the manner usual with such institutions, having a cashier, assistant cashier, receiving and paying tellers, book-keepers, etc. It was not, so far as the company was concerned, under any duty of keeping itself informed as to the conduct of Redwine. The company must have known and contemplated that the bank's business was to be carried on through its employés, including Redwine; and yet it entered into a contract which does not even suggest that it should be protected if any of these employés other than Redwine should fail in the duty they undoubtedly owed the bank of informing it of any misconduct on his part. Evidently, the company chose to rely solely upon the care which the bank would most probably exercise in protecting itself, and, consequently, did not require any fixed supervision over Redwine, being willing to content itself with the assurance that the interests of the bank would necessarily require such a supervision of him as would, in all probability, enable the bank to obtain actual knowledge of any fraud, dishonesty, or negligence of which he might be guilty.

In the light of the foregoing considerations, we cannot think that the parties to this contract contemplated that the bank would be bound to act upon mere constructive notice of Redwine's shortcomings. The "knowledge" referred to meant actual knowledge. Constructively, whenever Redwine—he being an employé of the bank handling its money—misapplied the same, the bank itself would have immediate notice of the fact; for his knowledge, as a servant of the bank, would, if the doctrine of constructive notice were applicable, be its knowledge. Surely, the contract cannot be construed as contemplating any such result as this. Again, suppose another employé was colluding with Redwine in concealing his shortage; the knowledge of such other employé would be, constructively, the knowledge of the bank. Or, suppose Redwine and another employé, also under bond, were both misappropriating the ⁶³⁹ bank's funds, and each found the other out. Could it be said in defense to a suit on Redwine's bond that the other employé's knowledge was the knowledge of the bank, or, when suit on the other employé's bond was entered, that Redwine's knowledge was constructive notice to the bank, and the legal equivalent of the "knowledge" referred to in the company's bond?

In the absence of any guarantee on the part of the bank that its other employés would be honest and faithful, and in view of the purpose of the condition inserted in the bond, it would seem that the better construction of it would be that the bank only obligated itself to act in good faith and impart only actual knowledge on its part. The bond would, indeed, be of no practical protection if, in order to realize its benefits, the bank had to insure, not only the honesty and fidelity, but the faithful and conscientious attention to duty, of a dozen others of its employés. Stupidity of an employé in not comprehending ordinarily apparent facts and circumstances which would be equivalent to actual knowledge if within the knowledge of the bank itself, might lead to a forfeiture of the bond; while forgetfulness or mere negligent inattention to duty on the part of such employés would bring about the same result.

The cashier, according to the undisputed testimony in this case, was a mere employe. Unless the bank obligated itself to use his eyes and ears, it had no knowledge of Redwine's misconduct.

The following cases throw much light upon the subject under consideration: In *Pittsburg etc. R. R. Co. v. Shaeffer*, 59 Pa. St. 350, it was held that where an officer of a corporation violates his duty, knowledge on the part of other officers of the corporation

of the default, or even connivance in it, does not discharge the sureties. In that case, the defaulting employe had given a bond, with sureties, for the faithful discharge of his duties. In delivering the opinion of the ⁶⁴⁰ court, Sharswood, J., says: "Corporations can only act by officers and agents. They do not guarantee to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, become responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become jointly obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from the responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by the conspiracy of the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences should be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defense: *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564."

In the latter case, it would seem that a mother bank established a branch, putting it into the hands of a directory for management, and itself appointing a cashier, requiring of him a bond. In speaking of a plea filed in defense to a suit upon the bond, Judge Robertson said, on pages 569, 570: "It imputes to the directory of the branch bank only a knowledge of the delinquencies of the cashier, and a connivance at them. It was their duty, if they had any such knowledge, to communicate it to the mother bank. And if they failed to do it, there would be more reason for charging them with fraud on the mother bank, than for ⁶⁴¹ imputing to it any fraud on the sureties of the cashier. It is not the presumption of either law or fact, that everything known to the branches is communicated to the principal bank. The cashier of a branch is an agent of the mother bank; the directors of the same branch are other agents of the same parent institution. Suppose these several agents combine to defraud their principal, is the one excused by the fact that the other is particeps? Is the surety of one exoner-

ated, because the other has co-operated in the malfeasance? Or suppose one connive at a fraud or improper conduct of the other, is the employer responsible, because one of its agents knew of the delinquency and might have prevented its recurrence? The legal maxim, 'Qui facit per alium facit per se,' does not apply to such a case. The connivance of the branch is not that of the mother bank. The fraud of the branch is not that of the mother institution, because, if the plea be true, there was a tacit combination of the agents to injure the principal. If A employ a principal to transact particular business, and exact from him security for his fidelity, and constitute another agent to perform other associate and supervisory functions, surely, if they both conspire to defraud their constituent, the security shall not be permitted to say that the act of the agent is that of the principal."

Brandt, in his work on Suretyship and Guaranty, section 369, recognizes and approves the doctrine laid down in the cases above referred to, and says: "If the sureties of one officer of a corporation could be relieved from liability by the neglect of duty of other officers of the corporation, the corporation would be deprived of all remedy": See additional cases cited by the author.

The above authorities will suffice to show that the doctrine of constructive notice has no application to transactions such as that in the present case. Not having required the bank to insure the fidelity of all its other employés as ⁶⁴² a condition precedent to recovery on Redwine's bond, the company cannot take advantage of the failure of duty on the part of one of the bank's employés. Undoubtedly, it was the duty of McCandless, the cashier, to inform the bank as to any misdoings of Redwine of which he knew. This was, however, a duty he owed the bank and not the company, which could only derive a benefit therefrom by express stipulation in its contract to the effect that it should be entitled to have such duty of McCandless to the bank faithfully performed. The bank suffered from such neglect to a far greater extent than did the company, whose liability under its bond was limited in amount; and surely, the bank is not equitably estopped from claiming a benefit under the bond which it expressly stipulated for.

3. The insufficiency of the amended plea referred to in the third head-note is obvious. Even actual knowledge by the bank of a default on the part of Redwine would not, of itself alone, release the company from liability. It was further essential to this result that the bank should fail to notify the company of the default in question, as it had contracted to do. As this plea alleged

no such failure, it stated no valid defense to the action, and was properly stricken.

4. The fourth head-note points out what we regard as a fatal variance between the allegata and the probata. An allegation that the bank had furnished the proof of loss stipulated for by the contract, could not be sustained by evidence tending to show that the defendant had waived such proof of loss. For this reason, it was error to deny a nonsuit.

Judgment reversed.

INSURANCE against the kind of losses mentioned in the principal case is a comparatively new business; but it has been held that a bond of indemnity given by a fidelity insurance company is governed by the principles of interpretation which apply to ordinary policies of insurance: *Mechanics' Savings Bank etc. Co. v. Guarantee Co. of North America*, 68 Fed. Rep. 459, a case in which a bank teller's bond was issued by a fidelity insurance company. Cases of this kind are extremely few. The same principles apply to a contract whereby a corporation binds itself to guarantee a merchant against loss from sales on credit resulting from the insolvency of customers, to be determined in a manner specifically described. The company is an insurance company, and the contract is one of insurance: *Shakman v. United States Credit System Co.*, 92 Wis. 366; 53 Am. St. Rep. 920.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MEADOWCROFT v. PEOPLE.

[163 ILLINOIS, 56.]

BANKING—LEGISLATIVE RIGHT TO REGULATE.—The business of a banker is affected with a public interest like that of an innkeeper or common carrier, and is, therefore, subject to legislative regulation. The right to engage in that business may be restrained by the sovereign authority and regulated by the legislature and it must be carried on in strict accordance with such statutes as have been enacted for its regulation.

THE POLICE POWER IS THAT INHERENT AND PLENARY POWER which enables the state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society. All persons possess their rights, whether to things tangible or intangible, subject to the general police power of the state.

CONSTITUTIONAL LAW—EVIDENCE, CHANGE IN RULES OF.—No one has a vested right in the rules of evidence. They pertain to the remedy, and are therefore subject to modification and control by the legislature.

CONSTITUTIONAL LAW—EVIDENCE, POWER TO MAKE FACTS PRIMA FACIE EVIDENCE OF CRIME.—The legislature has power to enact, even in criminal actions, that where certain facts have been proved, they shall be prima facie evidence of the main fact in question, if the fact proved has some fair relation to, or natural connection with, the main fact.

CONSTITUTIONAL LAW—BANKING, STATUTES MAKING THE RECEIVING OF DEPOSITS WHILE INSOLVENT A CRIME.—A statute declaring that if any person doing business as a banker shall receive a deposit while insolvent, whereby it is lost to the depositor, such person shall be deemed guilty of embezzlement, is constitutional.

CONSTITUTIONAL LAW.—A STATUTE MAKING THE FAILURE OF A BANKER within thirty days after receiving a deposit prima facie evidence of an intent on his part to defraud, is constitutional.

BANKING.—IT IS CRIMINAL NEGLIGENCE for a banker not to know of his own insolvency.

PENAL STATUTES, CONSTRUCTION OF.—The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, because the primary consideration in all cases is what is the legislative will. Therefore, the rule of strict construction is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding captious objections, and even the demands of exact grammatical propriety.

AN INDICTMENT STATING AN OFFENSE IN THE TERMS OF THE STATUTE creating it should be deemed sufficiently technical.

AN INDICTMENT CHARGING THAT THE ACCUSED, WHILE INSOLVENT and doing a banking business, did corruptly, willfully, and feloniously receive a deposit from a person not indebted to him, whereby the deposit was lost to such depositor, sufficiently charges the accused with the crime of embezzlement as a banker under the statutes of Illinois.

INDICTMENT, INTENT, CHARGING.—It is sufficient to charge a crime in the terms of the statute creating it without averring the intent of the accused, unless such intent is by the statute made one of the constituent elements of the evidence.

INDICTMENT CHARGING THAT MONEYS WERE RECEIVED BY THE ACCUSED AS BANKERS.—An averment that the accused, being persons then doing a banking business, had received certain moneys of another person not then indebted to them sufficiently states that the accused received such moneys as bankers and as a special bank deposit.

INDICTMENT AGAINST BANKERS.—An indictment charging that C. J. M. and F. R. M., persons doing business as bankers under the name of M. & Co., were insolvent, and while so insolvent received a deposit, is not defective in not charging the partnership with being insolvent.

BANKING—OFFER AT A CRIMINAL TRIAL TO REPAY LOST DEPOSIT.—If a banker is prosecuted for receiving moneys on deposit while insolvent, whereby such deposit shall be lost to the depositor, he is not entitled to an acquittal upon tendering on the trial to the depositor the amount of his deposit, if, in the mean time, the banker had suspended business because of his insolvency. The crime being once consummated, the right of the state to the conviction of the criminal cannot be taken away by his act.

CRIMINAL PRACTICE—VERDICT OF JURY, WHEN SUFFICIENT.—It is not necessary for the jury to find the value of the property embezzled, when neither the character of the evidence nor the mode of the punishment is contingent upon such value. Hence, if, under a statute authorizing the conviction of a banker for embezzlement if he has received moneys upon deposit while insolvent, and providing that his punishment shall be a fine of double the amount embezzled, and that, in addition thereto, he may be imprisoned not less than one nor more than three years, a verdict is sufficient which fixes the amount of the fine and the duration of the imprisonment, where the evidence clearly shows that the amount embezzled was more than one-half of the amount of the fine.

CRIMINAL PRACTICE.—A VERDICT TO THE EFFECT THAT THE TWO PERSONS accused shall be fined a sum, and imprisoned for a time, named is sufficient, and indicates that each shall be fined such sum.

Walker & Eddy and L. C. Collins, Jr., and George S. House, for the plaintiffs in error.

M. T. Moloney, attorney general, M. L. Raftree, T. J. Scofield, and M. L. Newell, for the people.

62 BAKER, J. The indictment upon which Charles J. Meadowcroft and Frank R. Meadowcroft, the plaintiffs in error, were convicted, was based upon the first section of "An act for the protection of bank depositors," approved June 4, 1879. Said section is as follows: "Be it enacted by the people of the state of Illinois, represented in the general assembly, that if any banker or broker, or person or persons doing a banking business, or any officer of any banking company or incorporated bank doing business in this state, shall receive from any person or persons, firm, company, or corporation, or from any agent thereof, not indebted to said banker, broker, banking company, or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery, when, at the time of receiving such deposit, said banker, broker, banking company, or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker, or officer so receiving said deposit shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and, in addition thereto, may be imprisoned in the state penitentiary not less than one nor more than three years. The failure, suspension, or involuntary liquidation of the banker, broker, banking company, or incorporated bank within thirty days from and after the time of receiving such deposit shall be prima facie evidence of an intent to defraud, on the part of such banker, broker, or banking company or incorporated bank."

The validity of this section of the statute is challenged on several grounds. It is urged that it is in derogation of that provision of our constitution which declares that **63** "no person shall be deprived of life, liberty, or property without due process of law" (Const. 1870, art. 2, sec. 2), and that the case is controlled by the decisions of this court in *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, *Fraser v. People*, 141 Ill. 171, *Ramsey v. People*, 142 Ill. 380, and *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206. The contention is, that every person living under the protection of our state government has the right to be engaged in the prosecution of any one of the ordinary and common call-

ings or business pursuits that is innocent in itself and has been followed from time immemorial, on the same terms that govern those engaged in other ordinary and common callings of business pursuits of life, and as incident thereto has the right to make the same contracts relative thereto as those engaged in such other ordinary and common callings or business pursuits are allowed to make; that the business of private banking is an ordinary and common industrial pursuit, like merchandising, manufacturing, mining, and very many other occupations of life, and is open to any one who may choose to embark in it; that one of the ordinary incidents and inherent elements of the business of a private banker is the receiving of deposits from his customer, and the relation of the banker to his depositor is the ordinary contract relation of debtor and creditor, the moneys deposited becoming the property of the banker, and not trust funds; that every person in this state, other than a private banker, engaged in the ordinary and common callings of life, is allowed to enter into contracts the result of which is to establish for himself the relation of debtor to every other person in the community who may deal with him, and that to deny to the private banker the right to prosecute his business, and, as incident thereto, to contract in regard to the same on the like terms as other ordinary and common callings or business pursuits are transacted, is to deprive him of both liberty and property, to the extent that he is thus denied the right to contract, without due process of law.

⁶⁴ The fundamental error in the contention thus formulated is the assumption that the business of banking stands upon exactly the same footing that the ordinary industrial pursuits of farming, merchandising, manufacturing, and mining, and the many other common occupations of life, stand upon. The business of a banker is not *juris privati* only, but, like that of an innkeeper or common carrier, is affected with a public interest, and therefore subject to public regulation. At common law, the business of banking is open to all, and may be followed by the citizen at pleasure, unless forbidden by legislative enactment. The right, however, to engage in banking may be restrained by the sovereign authority, and may be regulated by legislation, and it must be commenced and carried on in strict accordance with such statutes as have been enacted for its regulation: *Nance v. Hemphill*, 1 Ala. 551; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 377; *Curtis v. Leavitt*, 15 N. Y. 52; *People v. Bartow*, 6 Cow. 290. In *Bank of Augusta v. Earle*, 13 Pet. 519, it was said by Chief Justice Taney in delivering the opinion of the supreme court of the

United States: "And it is very clear that at common law the right of banking, in all of its ramifications, belonged to the individual citizens, and might be exercised by them at their pleasure. Undoubtedly, the sovereign authority may regulate and restrain this right; but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature in relation to banking corporations, and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances."

All persons possess their rights, whether to things tangible or intangible, subject to the general police power of the state: *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634. The police power is that inherent and ⁶⁵ plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety, and welfare of society: *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; 22 Am. Rep. 71; *Cole v. Hall*, 103 Ill. 30; *Harmon v. Chicago*, 110 Ill. 400; 51 Am. Rep. 698; *Dunne v. People*, 94 Ill. 120; 34 Am. Rep. 213. In *Cooley's Constitutional Limitations*, sixth edition, page 704, in discussing the police power of the states, it is said: "The police power of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."

A banker is a dealer in capital—an intermediate party between the borrower and the lender—who borrows of one party and lends to another; and the business of banking is, among other things, the establishing of a common fund for lending money: *Newmark on Bank Deposits*, sec. 21. And, as said by the supreme court of Wisconsin in *Baker v. State*, 54 Wis. 368, a bank implies capital, and capital invites confidence. A man holding himself out as a banker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession and subject to his control, and for that reason he may be safely trusted, and his business not only affects himself as a banker, but every person who deals with him as such. The object of the statute that is here challenged was evidently to protect the public from

being induced to deposit money with insolvent bankers, and there is manifest reason and necessity for protecting the community in their dealings with persons engaged in the banking business that do not exist in respect to their transactions with those employed in ⁶⁶ the ordinary agricultural, manufacturing, merchandising, and mining pursuits.

It is urged that proof that the accused is a banker or person doing a banking business, that he received a deposit from a person not indebted to him and at a time when he was insolvent, whereby the deposit is lost to the depositor, is not, in and of itself, and without evidence from which the jury can infer a criminal intent, sufficient to convict of a crime. And in that connection our attention is again called to the same constitutional provision already partially considered, that no person shall be deprived of life, liberty, or property, without due process of law, and also to the further provision of the constitution that the right of trial by jury, as heretofore enjoyed, shall remain inviolate, and, in connection therewith, to the fact that among the maxims of the common law which these constitutional provisions secure to the citizen are these: that every man is presumed innocent until proven guilty, and that the burden is upon the state to overcome that presumption of innocence by a preponderance of the evidence; and the claim is made, that in that the statute provides that the failure, suspension, or involuntary liquidation of the banker, within thirty days from and after the time of receiving the deposit, shall be prima facie evidence of an intent to defraud on the part of the banker, such statute is in derogation of these rights so secured, and therefore unconstitutional and void.

The law always presumes an accused party innocent until he is proved to be guilty—and this is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact: Cooley's Constitutional Limitations, *309. But no one has a vested right in the rules of evidence, and in legal contemplation they are not regarded as being of the essence of any right with which a party is invested. They pertain to the remedy, and are subject ⁶⁷ to modification and control by the legislature: See Cooley's Constitutional Limitations, *367.

In *Board of Commissioners v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, it is said: "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define

precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act *prima facie* evidence of crime which had no relation to a criminal act, and no tendency whatever, by itself, to prove a criminal act. But so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." And in the later case of *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, the same court held that the state legislature has power to enact that even in criminal actions, where certain facts have been proved, they shall be *prima facie* evidence of the main fact in question, but that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact, and that the inference of the existence of the main fact because of the existence of the fact proved must not be purely arbitrary, unreasonable, unnatural, or extraordinary, and the accused must have a fair chance to make his defense and to submit the whole case to a jury. In *State v. Buck*, 120 Mo. 479, it was held, after a full review of the authorities, that a section of the statute of that state which makes it a criminal offense for an officer of a bank to receive a deposit knowing the bank to be insolvent, and providing that subsequent failure of the bank shall be *prima facie* evidence of such knowledge, is not violative ⁶⁸ of a constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate."

Plaintiffs in error call attention to *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26, and other cases, which apparently announce a rule somewhat in conflict with that held in the authorities we have cited. They seem, however, to be against the weight of authority. At all events, this court is committed to the doctrine as held in New York, Missouri, and other states, that the legislature may provide that a designated fact or facts shall be *prima facie* evidence of a certain other fact, but subject to the restrictions stated in the authorities to which reference has been made. In *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 382, 41 Am. St. Rep. 278, we said: "It is argued that the provision of the statute making the schedule of the commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges, is unconstitutional and void, not only as depriving the carriers of

their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence: 2 Rice on Evidence, 806, 807; Commonwealth v. Williams, 6 Gray, 1; State v. Hurley, 54 Me. 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury, caused by sparks from a locomotive passing along the road, prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. . . . Acts making tax deeds prima facie evidence of the regularity of proceedings antecedent to the deed ⁶⁹ have been held to be valid: 2 Rice on Evidence, 607; Hand v. Ballou, 12 N. Y. 541; Delaplaine v. Cook, 7 Wis. 54; Allen v. Armstrong, 16 Iowa, 508; Wright v. Dunham, 13 Mich. 414; Gage v. Caraher, 125 Ill. 447." See, also, Chicago etc. R. R. Co. v. People, 67 Ill. 11; 16 Am. Rep. 599. And in American etc. Sav. Bank v. Gueder etc. Mfg. Co., 150 Ill. 336, where the same statute now in question was under consideration, it was held that in cases where said statute applies, the receipt of the deposit is prima facie proof of fraudulent intent, and that the rule of evidence established by the statute applies both to criminal prosecutions and civil proceedings, and wherever acts done in contravention of the provisions of the statute are the subject of judicial investigation.

If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency. The Criminal Code, paragraph 280, declares that a criminal offense consists in a violation of the public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence. In cases of the failure, suspension, or involuntary liquidation of a banker within thirty days after he has received a deposit from his customer, it

cannot fairly be said that the fact of such failure, suspension, or involuntary liquidation does not tend to show that he was insolvent when he received the deposit, and since, if he was then insolvent, he is presumed to have known of such insolvency at that time, and it is criminal negligence, under all ordinary circumstances, for him not then to have known of it, the inference that when he received ⁷⁰ such deposit it was with a fraudulent intent on his part is not so purely arbitrary, unreasonable, unnatural, or extraordinary as would justify the courts in saying that such a failure within thirty days had no fair relation to, or connection with, the existence of a fraudulent intent at the time of the deposit, and that therefore the act of the legislature is unconstitutional, null, and void. The words of the statute, "prima facie evidence," *ex vi termini* imply that the fraudulent intent may be rebutted by any competent testimony. It is only in a very clear case that the courts will assume to declare the invalidity of a statute enacted by the legislature, and no clear and palpable case of invalidity here appears.

It is assigned as error that the court denied the motion to quash the indictment. The indictment is substantially as follows: That Charles J. Meadowcroft and Frank R. Meadowcroft, on the third day of June, 1893, in said county of Cook, in the state of Illinois, then and there being persons then and there doing a banking business under the name of Meadowcroft Brothers, corruptly, willfully, fraudulently, and feloniously did receive from one John D. Collins one hundred current United States of America treasury notes, etc., of the value of, etc., of the personal goods, money, and property of the said John D. Collins, the said John D. Collins then and there not being indebted to the said Charles J. Meadowcroft and Frank R. Meadowcroft when, at the time of receiving the said money and deposit, to wit, on the said third day of June, etc., said Charles J. Meadowcroft and said Frank R. Meadowcroft, said persons then and there doing a banking business as aforesaid, were then and there insolvent, whereby and because of which insolvency the said money deposit so then and there made as aforesaid was then and there lost to him, said John D. Collins, whereby and by force of the statute in such case made and provided, etc.

It is urged that the statute is penal, and must therefore be strictly construed. But the rule of strict construction ⁷¹ does not prevent our calling in the aid of other rules and giving to each its appropriate scope, the ascertainment of the legislative will being the primary consideration after all: Bishop on Statutory Crimes, sec. 200. A strict construction is not violated by

giving the words of a statute a reasonable meaning, according to the sense in which they were intended, and disregarding capacious objections, and even the demands of an exact grammatical propriety: Bishop on Statutory Crimes, sec. 212. And a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction: 6 Bacon's Abridgment, 391; People v. Bartow, 6 Cow. 290.

It is claimed that the indictment is defective in not containing a specific averment of an intent, at the time of receiving the money, to defraud John D. Collins. The indictment states the offense in the terms and language of the statute creating the offense, and is, therefore, to be deemed sufficiently technical and correct. Such is the legislative mandate (Crim. Code, par. 408), and very numerous decisions of this court have given effect to it. And, in addition thereto, it charges that the act was corruptly, willfully, fraudulently, and feloniously done. It is to be noted that the offense is created and defined in the first part of the section, and that the office of the last sentence of the section—to the effect that the failure, suspension, or involuntary liquidation of the banker within thirty days from and after the time of receiving the deposit shall be prima facie evidence of an intent to defraud on the part of such banker—is merely to establish a rule of evidence that shall be applicable in trials for the offense that had already been created and defined. It may be granted that it is a legislative recognition of the fact that in the commission of the offense created there must be a criminal intent, or that negligence which is its equivalent; but such recognition is nothing more than the recognition of the principle of the common law, which, as we have already seen, is also embodied and ⁷² declared in the Criminal Code in the words that in the commission of a criminal offense there must be a union or joint operation of act and intention, or criminal negligence. The act upon which the indictment is based does not require that there should be either an averment or proof of a specific intent to defraud John D. Collins. Under our statutory rule it is sufficient to charge the offense in the terms and language used in creating and defining it, and it is only when such terms and language mention the intent as one of the constituent elements of the offense created, that it is necessary to allege the criminal intent: McCutcheon v. People, 69 Ill. 601. The essential element of a criminal intent or criminal negligence is, however, implied, since it is of the essence of every criminal offense, and it must in some way appear in order to justify a conviction. A statute makes an act a crime, and either provides that proof of

a specific fact or facts shall be prima facie evidence of evil intent, or else the law infers the evil intent from the act itself. But if it appears, upon the whole case, that the thing done is not within the intention of the law, then it is not within the law, though within its letter.

It is claimed that the indictment is defective in not specifically and in express terms averring that the defendants received the money of the prosecuting witness as bankers and as a general bank deposit. The indictment does allege that the defendants, "being persons then and there doing a banking business under the name of Meadowcroft Bros., . . . did receive from one John D. Collins" certain specified moneys of certain specified values, "of the personal goods, money, and property of the said John D. Collins, the said John D. Collins then and there not being indebted to" the said defendants. The charge is in the terms and language of the statute, and, tested by the statutory rule, is to be deemed sufficiently technical and correct. If the defendants, while doing a banking business, received a deposit, the reasonable and ⁷³ natural conclusion is, that they received the deposit in their capacity of bankers, and the rule is, that a deposit is general unless the depositor makes it special, or deposits it expressly in some particular capacity: *Ward v. Johnson*, 95 Ill. 215; *Brahm v. Adkins*, 77 Ill. 263.

It is urged that the indictment is defective because it does not charge that the partnership of Meadowcroft Brothers, as a partnership, was insolvent on June 3, 1893, or at any other time. The claim, in substance, is, that since the indictment simply charges that Charles J. Meadowcroft and Frank R. Meadowcroft, persons doing a banking business under the name of Meadowcroft Brothers, were then and there insolvent, non constat that the partnership of Meadowcroft Brothers was then and there insolvent, and that therefore the facts alleged, if conceded to be true, do not constitute a crime. This claim is based upon the theory that a partnership is a legal entity, distinct from and independent of the persons composing it. Whatever may be the law of other states, such is not the law of this state. Most of the cases relied on to establish the proposition seem to have been decided in states that have either adopted a code, or have abolished the distinction between legal and equitable rights and remedies, or have enacted statutes giving to copartnerships a quasi personal existence. In this state the rule which requires the assets of a firm to be first applied to the payment of firm debts, and the individual assets of the several partners to be first applied to the payment

of the individual debts of the several partners is not a rule that is recognized or enforced in a court of law, but a rule of equity that is enforceable only in courts exercising equitable jurisdiction, and is not founded on the equities of the creditors, but is worked out only through the medium of the equities of the partners: *Hanford v. Prouty*, 133 Ill. 339, and numerous other cases. At law, the individual debts and the partnership debts are placed upon ⁷⁴ the same footing, and are to be paid *pari passu* out of the assets: *Ladd v. Griswold*, 4 Gilm. 25, 46 Am. Dec. 443, and subsequent cases.

The statute under consideration provides "that if any banker or broker, or person or persons doing a banking business, or any officer of any banking company or incorporated bank," shall receive a deposit, etc. It does not mention or say anything about a firm or copartnership. The indictment follows the statute, and alleges "that Charles J. Meadowcroft and Frank R. Meadowcroft, then and there being persons then and there doing a banking business under the name of Meadowcroft Bros.," received a deposit. If Charles J. Meadowcroft and Frank R. Meadowcroft were persons doing a banking business, and were insolvent, and received a deposit under the circumstances denounced by the statute, it would seem they must be guilty of the offense prohibited by that statute. The fact that they did their banking business under the name of "Meadowcroft Bros.," did not make that mere name a legal entity and endow it with a personal existence distinct from and independent of themselves. In fact, "Meadowcroft Bros." was simply the firm name or trade name in which Charles J. Meadowcroft and Frank R. Meadowcroft did the banking business of Charles J. Meadowcroft and Frank R. Meadowcroft, and if they were solvent then "Meadowcroft Bros." was solvent, and if they were insolvent, then "Meadowcroft Bros." was insolvent, for there was no such person, either natural or artificial, in existence as "Meadowcroft Bros." distinguishable from Charles J. Meadowcroft and Frank R. Meadowcroft. There was, therefore, no necessity for averring in the indictment the insolvency of Meadowcroft Brothers. Our conclusion is, that there was no error in overruling the motion to quash the indictment.

It is assigned as error that the court denied the motion of the defendants, made at the November term, 1894, to be set at liberty for want of prosecution. It appears ⁷⁵ that they were indicted at the April term, 1894, of the criminal court of Cook county; that the defendant Frank R. Meadowcroft gave bail on May 5, 1894, it being one of the days of the said April term, and that the defendant Charles J. Meadowcroft gave bail on May 7, 1894, it being

the first day of the May term, 1894. It also appears that the June, July, August, September, and October terms, 1894, of said court were held after the return of the indictment and the giving of bail, and prior to the entry of said motion at said November term to be set at liberty.

In *Gallagher v. People*, 88 Ill. 335, the question arose as to the construction to be placed upon the latter part of section 18 of division 13 of the Criminal Code, which reads as follows: "If any such prisoner shall have been admitted to bail for a crime other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear, by oath or affirmation, that the witnesses for the people of the state are absent, such witnesses being mentioned by name and the court shown wherein their testimony is material." The there defendant had been indicted and had entered into recognizance at the May term, 1874, of the court, and the claim made was, that he was entitled to be discharged at the third term after bail was given, and was not required to appear at the September term, 1876. It was held that since he was out on bail he was not entitled to be discharged at the third term after bail was given, because it was not shown that the various continuances were had on the application of the people, or that the accused was present, ready for or demanding a trial; and it was there said that the statute "only authorized the accused, who is under bail, to demand a trial, and, if not granted at the third term, to be discharged from bail and prosecution under the indictment then pending." In the case at bar it appears from the affidavit of the defendant Frank R. Meadowcroft, submitted on the motion to be set at liberty, that he appeared and gave bail on the fifth day of ⁷⁶ May, 1894, and, further, "that neither he nor his counsel, nor any one in his behalf, has appeared in court, for any purpose whatsoever, since the said fifth day of May, A. D. 1894"; and it appears from the affidavit of the defendant Charles J. Meadowcroft, presented at the hearing of said motion, that he appeared and gave bail on the seventh day of May, 1894, and "that neither he nor his counsel, nor any one in his behalf, has appeared in court, for any purposes whatsoever, since the said seventh day of May, A. D. 1894." If the defendants were out on bail and never appeared in court until the November term, then, as matter of course, they were not put upon trial until that term. Even if we should assume that it was legally possible for the prosecution to try the case in their absence from court, yet it is very clear that the prosecution was not bound so to do. The defendants were fortunate in that judgments of forfeiture were not taken upon

their bail bonds, if so be it that they were not declared forfeited. There was no error in denying the motions for discharges.

A multitude of questions are raised in this case by the fifty-four elaborate assignments of error upon the record and in the almost three hundred printed pages of brief and argument filed by the plaintiffs in error, and an analysis of the statute upon which the indictment is based will facilitate the consideration of these questions. The substance of the section, expurgating all words that are not essential to the present inquiry, is this: If any banker, person or persons doing a banking business, shall receive from any person or persons not indebted to said banker any money, when, at the time of receiving such deposit, said banker is insolvent, whereby the deposit so made shall be lost to the depositor, said banker so receiving said deposit shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, etc.

77 Waiving the question of evil intent, what elements enter into the commission of the crime created by this section of the statute? Plainly these: the defendants must be bankers, or persons doing a banking business; they must receive money on deposit; they must be insolvent at the time of receiving such money on deposit, and the money so received on deposit must be lost by reason of such insolvency. The natures of the first three of these elements are easy enough of comprehension. In respect to the last there is more difficulty. The words of the statute are, "whereby the deposit so made shall be lost to the depositor." When lost? At the time that the deposit is received by the insolvent bankers? Or when, by the failure, suspension, or involuntary liquidation of the bankers, by reason of insolvency, the depositor is deprived of the use and benefit of his deposit? Or is it when, upon final settlement of the insolvent estate, the exact amount that will not be repaid by the dividends declared is definitely ascertained? Or is it after the death of the bankers and the final settlements of the testate or intestate estates left by them, and when, for the first time, it can be known just how much, if any, of the deposit is so absolutely lost to the depositor as that it will never be returned to him?

The statute provides that if any bankers shall receive any money when, at the time of receiving such deposit, said bankers are insolvent, "whereby the deposit so made shall be lost to the depositor," said bankers "so receiving said deposit shall be deemed guilty of embezzlement," and, upon conviction thereof, shall be

fined "in a sum double the amount of the sum so embezzled and fraudulently taken." The expressions, "the deposit so made" and "so receiving said deposit," if literally and rigidly construed, would seem to imply the whole amount of the deposit; and the expression, "the amount of the sum . . . fraudulently taken," if alone considered, would seem to point to the time when the deposit is first received. Upon our first examination of the statute, we ⁷⁸ were inclined to the conclusion that the crime denounced therein was complete at the time of receiving the deposit, provided the bankers were then insolvent, and that the sum of money deposited and "fraudulently taken" would in all cases be the amount that, within the contemplation of the statute, was "lost to the depositor," but, upon further consideration, we are satisfied of the impropriety of such conclusion.

As we have already seen, one of the essential elements of the statutory offense is, that the deposit "shall be lost to the depositor." The word "shall" is in the future tense, and is indicative of a future event. Although the bankers are insolvent and receive a deposit while so insolvent, yet it does not necessarily result that either the whole or any portion of the sum deposited is either lost to the depositor or embezzled by the bankers. It may well be that the sum so deposited is, in view of the existing solvency of the bankers, "fraudulently taken" by them, but such fraudulent taking does not, in and of itself, constitute the offense. It is only when "the deposit so made shall be lost to the depositor" that the bankers "shall be deemed guilty of embezzlement," and the fine is to be a sum that is "double the amount of the sum so embezzled and fraudulently taken." If the entire amount of the deposit is paid back to the depositor or paid out upon his checks prior to failure, suspension, or involuntary liquidation of the bankers, it is plain that no money of the depositor has been either lost to such depositor or embezzled by the bankers; and it is equally plain that if a part of it is checked out and paid before such failure, suspension, or involuntary liquidation, then the amount so paid is neither lost nor embezzled.

When a deposit of money is made, the bankers, in contemplation of law, have money on hand to the full amount of the sum deposited, ready to deliver when called for, and their contract with the depositor is to refund that same amount on demand. When a deposit is received by ⁷⁹ bankers, they at the time being insolvent, and it, or any part of it, is not paid back on demand, as contemplated by the agreement between them and the de-

positor—and this because of the insolvency of such bankers and their consequent inability to repay—and the bankers fail, suspend, or go into involuntary liquidation, then, within the true intent and meaning of this statute, which is entitled “An act for the protection of bank depositors,” such sum, or such part of it as has not been so paid back, is “lost to the depositor,” and in contemplation of law “embezzled” by the bankers. It is true that the language of the statute is, “whereby the deposit so made shall be lost,” and that those words give some color to the claim that the loss of the whole amount of the deposit is implied by the statute. We are, however, unable to concur in the suggestion of counsel that the crime is not complete without the loss of the entire deposit. The statute must receive a reasonable construction. The statute uses the words “shall receive . . . any money” as well as the words “such deposit” and “the deposit,” and these latter expressions are broad enough to include, and do include, not only the total sum deposited, but also the constituent parts of such sum. The whole of a thing necessarily includes all of its parts, and it will not be imputed to the legislature that it entertained any such absurd intention as that if there was a fraudulent receipt by an insolvent banker of a deposit of one hundred dollars and the entire one hundred dollars was lost to the depositor it would be embezzlement, whereas if five dollars of the one hundred dollars deposited was paid out on the depositor’s check and the ninety-five dollars lost there would be no embezzlement. It would seem, however, that this particular matter is of but little importance in the case at bar, for the evidence is, that plaintiffs in error failed and closed their doors without having repaid Collins, the prosecuting witness, any part of the two hundred dollars deposited by him.

The crime created by the statute is consummated when the insolvent bankers fraudulently receive the deposit, ⁸⁰ and by their failure, suspension, or involuntary liquidation, by reason of insolvency, the depositor is deprived of the benefit of his deposit, or such portion of it as has not already been paid back to him or upon his checks. The depositor is then—at that time—deprived of his contract right to have the money refunded upon demand or paid out upon checks drawn by him, and, being deprived of this right, the deposit, within the purview of the statute, is then “lost to the depositor.” This meaning placed upon the word “lost” is not unauthorized, for the rule is, that in construing a statute the court is not restricted to the primary meaning of a word used,

where, from a consideration of the whole and every part of the statute, it is plain that the word is used in a different sense: *Springfield v. Green*, 120 Ill. 269.

The view we have taken carries into effect the legislative intention, and gives force and vitality to a wholesome statute. On the other hand, to construe the statute as meaning that there can be no conviction until it can be clearly and definitely ascertained what the exact amount is that can never be recovered and is permanently and absolutely lost would utterly defeat the object of the statute. It would seem that such amount can never be so ascertained until after the death of the banker and the final settlement of his estate by his administrator. And even if it should be held that what the statute contemplates is the ascertainment of the amount of the deficit after the distribution of the proceeds of the property that the banker owned at the time of his suspension of business, yet it can readily be seen that usually, in fact almost always, many years would pass before final settlement of that estate would be made, and in the mean time the statute of limitations would frequently bar any prosecution for the offense committed. And it is to be borne in mind it is important the exact amount of the deposit lost to the depositor shall be definitely ascertained, for the statute expressly provides that the fine ⁸¹ imposed in case of conviction shall be a sum double the amount of the sum so embezzled and fraudulently taken.

There is authority, as well as reason, to sustain the conclusions we have reached in regard to the meaning of this statute. In *Queenan v. Palmer*, 117 Ill. 619, 629, the words of the statute were, "make good all losses to depositors or others." This court there said: "What is meant by the term 'losses,' as used in the statute? It would seem, from the argument, that defendants would restrict the meaning of the term 'losses' to signify only the difference between the depositor's claim and what he might realize by an action or bill against the insolvent bank. . . . It cannot be that the term 'losses' was used, in this connection, in that restricted sense as to mean that which can never be recovered, otherwise there might be no such thing as any 'losses' to the depositors in this case, for there might exist a remedy against the bank for one portion and against the stockholders for the residue, and what would there be left for the term to attach? Obviously, the term 'losses' was used in a more general sense, and one usually attached to it by common understanding. In its most general sense, the word 'loss' means any deprivation. In some instances it may mean that which can never be recovered, and in others that

which is simply withheld or that of which a party is dispossessed. Often the context assists to a clearer understanding of the words employed in a statute or written agreement. By another section this corporation was authorized to receive deposits from laborers and servants, and was obligated to repay such deposits when required. The suspension of the bank, by reason of insolvency, was an absolute refusal to repay the deposits to the owners, and operated as a deprivation—a withholding of the same from the depositors—and that is a loss, in the ordinary acceptance of the word. A portion of the value of such deposits, or all, might ultimately be recovered from either the bank or stockholder, but the deposits are lost ⁸² to the owner. After the suspension of the bank nothing remained of his deposits but the obligation of the bank or the stockholders to pay the value. That obligation might, or might not, be of value to him, depending on the fact of the solvency or insolvency of both the corporation and the stockholders. At all events, the funds have been wasted by the corporation becoming partially or totally insolvent, and that is a loss to the depositor in the sense that term is used in the statute, and his right to proceed against the stockholders arises at once. Any other definition of this word 'losses' would be inconsistent with the context, and would afford no adequate security to the depositors or others dealing with the bank."

It is claimed that the state failed to make out a case at the trial, because it did not show that the deposit made on June 3, 1893, by Collins, was a general deposit, as distinguished from a special or specific deposit. That fact is amply shown by the testimony of Collins and his bank-book, which was introduced in evidence. Besides this, a deposit of money with bankers at their banking house is regarded as general, unless it appears that the depositor makes it special or deposits it expressly in some particular capacity: *Brahm v. Adkins*, 77 Ill. 263.

A like failure to make out a case is claimed because it is not shown that Collins ever made a demand for the return of his deposit and that defendants refused to comply with such demand. It appears from the evidence that Collins deposited the two hundred dollars on Saturday, June 3, 1893, and that when he returned to the bank on Monday, June 5th, he found the door closed and a card of the receiver of Meadowcroft Brothers tacked thereon and the bank not open or doing business, and also that the defendants were insolvent, and have never resumed business. When a bank or banker suspends payment and closes the doors against depositors and creditors, and discontinues banking oper-

ations, it or he waives the necessity for a demand on the part of its or his depositors: *Watson v. Phoenix* ⁸³ Bank, 8 Met. 217; 41 Am. Dec. 500; *Planter's Bank v. Farmers' etc. Bank*, 8 Gill & J. 449. And in the late case of *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, it was held by the supreme court of North Carolina that, where a bank closes its doors and commits an act of insolvency, its deposits become immediately due, without demand or notice. The case of *Wright v. People*, 61 Ill. 382, is not here in point, for there the failure to deliver on the demand of the consignor was, by the express terms of the statute there involved, made a constituent element in the offense that was created.

At the conclusion of the evidence for the state the defendants called Collins to the stand, and after he had testified that he had never made any demand upon the defendants, or either of them, for the return of the deposit, counsel for the defendants then and there, on behalf of the defendants, tendered to Collins the full amount of the deposit, with interest thereon. Collins declined the tender, whereupon the money was deposited with the clerk of the court, subject to his order. It is claimed by counsel that if it appears, even after indictment and at any stage of the proceedings thereon, that the depositor has recovered or will recover his deposit in full, and will sustain no absolute and ultimate loss, then the prosecution must fail, even though the banker, on the day of receiving the deposit, was hopelessly insolvent. This claim is based on the clause of the statute which says, "whereby the deposit so made shall be lost to the depositor." We have already placed a construction upon that clause, and it will readily be conceded that, if we are right in the construction we have given it, then the contention now under consideration cannot be sustained. It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. ⁸⁴ The effect of the tender and payment into court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned; but the crime having been fully consummated before indictment found, it is not within the power of the banker or the depositor, or either of them, to compromise or take away the right of the state to insist upon a conviction for the crime committed. It is not to be presumed that in creating the offense and providing for its punishment it was the intention of the legislature to make

the criminal courts of the state collecting agencies for collecting the debts due to depositors from insolvent banks and bankers.

The view we have taken of the statute eliminates from consideration most, if not all, of the objections that are urged by plaintiffs in error to the rulings of the trial court on questions relating to the admissibility of testimony and upon the instructions. It is manifest that in these rulings the trial court held the law more strongly in favor of the plaintiffs in error and against the prosecution than was warranted by the statute. The state assumed at the trial a much greater burden of proof than the law imposed upon it. The result was, that the rulings upon matters of evidence and upon instructions were more favorable to plaintiffs in error than they were entitled to, and they have no just ground for complaint in that regard. Even if it be conceded that some technical errors were committed pending the struggles of the state under the unwarranted burdens that at the trial were imposed upon it, yet they were immaterial, so far as the real merits of the case were concerned, and plaintiffs in error were not damnified by them.

The evidence abundantly sustains the verdict of the jury. The testimony is exceedingly voluminous, owing to the matters already suggested. We refrain from any discussion of the facts of the case, as no useful purpose would be accomplished thereby.

⁸⁵ It is urged that there are two obvious objections to the verdict that was returned by the jury that tried the case, either of which, under the law, is fatal to the validity of the verdict, and of the judgment of the court. The verdict was as follows: "We, the jury, find the defendants, Frank R. Meadowcroft and Charles J. Meadowcroft, guilty of embezzlement in manner and form as charged in the indictment, and we fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at a fine in the sum of twenty-eight dollars (\$28), and in addition thereto at imprisonment in the penitentiary for the term of one year."

The first of the objections made is, that the jury did not find, in their verdict, the sum of money or value of the deposit embezzled; that the punishment that by the mandate of the statute must be imposed is the fine, the imprisonment being optional with the jury, and that this fine must be fixed by the jury at a sum that is double the amount of the sum that is embezzled. The claim is, that it is clearly settled in this state that wherever the punishment depends upon the value of the article stolen or embezzled, the jury must affirmatively and expressly find that value, and a general verdict is bad and will not support a conviction.

The cases of *Highland v. People*, 1 Scam. 392, *Sawyer v. People*, 3 Gilm. 53, *Hildreth v. People*, 32 Ill. 36; *Collins v. People*, 39 Ill. 233; *Williams v. People*, 44 Ill. 478; *Tobin v. People*, 104 Ill. 565; and *Thompson v. People*, 125 Ill. 256; are relied on as sustaining this doctrine. The claim, as urged, is too broad. The rules of the common law do not require that the jury should, in terms, find the value of the property charged to have been stolen or embezzled. It is only by force of our statutes, and in cases where the character of the offense and the mode of punishment depend upon the value of property, that the value of such property is required to be found in the verdict. In *Sawyer v. People*, 3 Gilm. 53, it is said that where the value of the property determines the character of the ⁸⁶ offense and regulates the mode of punishment, it is necessary for the jury to ascertain the value and state it in their verdict, that the court may know with certainty whether the accused should be subjected to punishment by confinement in the penitentiary, or by the payment of a fine and imprisonment in the county jail. Like language is used in *Highland v. People*, 1 Scam. 392; and the other cases relied on are expressly decided upon the authority of *Highland v. People*, 1 Scam. 392, and *Sawyer v. People*, 3 Gilm. 53. Here, neither the character of the offense nor the mode of the punishment is contingent upon the value of the deposit embezzled by the banker. Upon conviction the fine is to be imposed at all events, and whether the value of the property embezzled is one dollar or four hundred dollars, and the optional punishment of imprisonment in the penitentiary may lawfully be inflicted when the value of the property is a single dollar and omitted when its value is hundreds or even thousands of dollars. The most that can be said is, that the amount of the fine depends upon the value; but that goes only to the measure or quantity of punishment, and not to the character of the offense or the mode of punishment. We are not inclined to extend the doctrine relied on beyond the requirements of the rule and apply it to cases not within the reason of the rule. Here the fine fixed by the jury was only twenty-eight dollars, and, as we have already seen, it should, under the evidence and the law, have been four hundred dollars. Plaintiffs in error are not injured, and cannot be heard to complain.

The other objection to the verdict is, that it fixed a joint instead of a several punishment for the two defendants. In *Moody v. People*, 20 Ill. 316, this court said, "where several persons are jointly indicted and convicted they should be sentenced severally, and the imposition of a joint fine is erroneous." If each de-

fendant was guilty of the crime charged, then each incurred the penalty or penalties provided by the statute, and the jury should have fixed the punishment of each. The verdict in this case is ⁸⁷ very informal, but is it to be regarded as invalid? It is to be kept in mind that juries are usually composed of men who are not learned in the forms of the law or exact in their use of language, and, therefore, all reasonable intendments should be made in order to sustain their verdicts when the validity of such verdicts is challenged on merely technical grounds. If the verdict was, simply, "We fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at imprisonment in the penitentiary for the term of one year," then, growing out of the nature of the punishment, the verdict, though informal, would without doubt be regarded as a sufficiently distinct fixing of punishment at imprisonment for one year as against each defendant. It would not, in such case, reasonably or without leading to absurdities be regarded as the fixing of a single term of one year for the two defendants jointly, the further punishment of each to be discharged upon his suffering imprisonment for six months of the term. This being so, and the "imprisonment in the penitentiary for the term of one year" being fixed as a part of "the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft," and in immediate conjunction therewith and connected with it by the clause "and in addition thereto," the jury fixing the other part of the punishment "at a fine in the sum of twenty-eight dollars," we think there can be no reasonable doubt but that it was the intention of the jury to fix the punishment of each defendant at a fine of twenty-eight dollars as well as at imprisonment in the penitentiary for the term of one year. It is evident that the criminal court so regarded and understood and acted upon the verdict, for it sentenced the defendant Frank R. Meadowcroft to imprisonment in the penitentiary for a term of one year and rendered a several judgment against him for a fine of twenty-eight dollars, and awarded execution therefor, and also sentenced the defendant Charles J. Meadowcroft to imprisonment in the penitentiary for a term of one year, and rendered a several judgment ⁸⁸ against him for a fine of twenty-eight dollars and awarded execution therefor.

We find no error in the record for which the judgment should be reversed, and it is therefore affirmed.

JUDGE PHILLIPS dissented, on the ground that the verdict of the jury did not find the sum of money or the value of the deposit embezzled, and on the further ground that the verdict fixed a joint instead of a several punishment for the two defendants.

BANKING—LEGISLATIVE POWER TO REGULATE.—A constitutional provision that no law shall be passed giving to any citizen, class of citizens or corporations privileges and immunities which upon the same terms do not equally belong to all citizens or corporations inhibits the enactment by the legislature of a statute confining the right to exercise banking powers, other than the issuing of bills to circulate as money, to corporations: *State v. Scougal*, 3 S. Dak. 55; 44 Am. St. Rep. 756.

POLICE POWER—WHAT IS.—The police power of the state is its right to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on the like power vested in Congress by the federal constitution or which do not violate any of the provisions of the organic law: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390, and note. See, also, the extended note to *State v. Goodwill*, 25 Am. St. Rep. 882.

EVIDENCE—POWER OF LEGISLATURE TO CHANGE RULES OF.—Rules of evidence are subject to control and modification by the legislature, whether affecting proof of existing rights or rights subsequently acquired, and changes in them may be made applicable to existing causes of action: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278, and note. See, also, the extended note to *People v. Cannon*, 36 Am. St. Rep. 682, on the validity of statutes creating presumptions.

INDICTMENT—SUFFICIENCY OF GENERALLY.—An indictment following the language of the statute is generally sufficient: *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389. See the extended note to *State v. Campbell*, 94 Am. Dec. 253.

PENAL STATUTES SHOULD BE STRICTLY CONSTRUED: *Gates v. McDaniel*, 2 Stew. 211; 19 Am. Dec. 49; *Warner v. Commonwealth*, 1 Pa. St. 154; 44 Am. Dec. 114; *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658; note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 34.

WEAVER v. PEASLEY.

[163 ILLINOIS, 251.]

AN EXECUTION NOT UNDER THE SEAL OF THE COURT is void, and cannot be made valid by an amendment after a sale thereunder. Such a sale should be set aside on motion.

ESTOPPEL.—A JUDGMENT DEBTOR IS NOT ESTOPPED from having a sale made under execution set aside because the writ was not under seal by the fact that before the sale he interposed a motion to stay the levy and sale on other grounds, and did not resist a motion made by another judgment debtor to share in the proceeds of the sale, and permitted the sale to be made without objection, where it appeared that such judgment debtor did not know of the defect in the process at the time of the sale.

Fifer & Barry, for the appellant.

A. W. Peasley, pro se and for the appellees.

253 CARTWRIGHT, J. The circuit court of McLean county overruled a motion of appellees to set aside a sale of lands under

an execution upon a judgment against them in favor of appellant. One ground of the motion was, that the execution was void for want of a seal. The appellate court held that the circuit court erred in not sustaining the ²⁵⁴ motion, and the judgment was reversed and the cause remanded, with directions to vacate and set aside the execution and sale. On the hearing of the motion appellant entered his cross-motion for leave to amend the execution by attaching a seal. The cross-motion was denied. It is contended by counsel for appellant that the execution was amendable, and the action of the circuit court in denying the motion was assigned as a cross-error in the appellate court.

It is insisted that the appellate court erred in holding the execution void for want of a seal, and in not sustaining the cross-error. The statute requires all process to be sealed with the seal of the court: Starr & Curtis' Stats., c. 37, par. 67. It has been settled by numerous decisions in this state that this provision is mandatory; that an execution not under the seal of the court is void, and may be successfully resisted wherever the question may arise: Bybee v. Ashby, 2 Gilm. 151; 43 Am. Dec. 47; Davis v. Ransom, 26 Ill. 100; Roseman v. Miller, 84 Ill. 297. And an execution which is void for such reason cannot be amended after sale: Sidwell v. Schumacher, 99 Ill. 426; Eagan v. Connelly, 107 Ill. 458; In Sidwell v. Schumacher, 99 Ill. 426, it became necessary to determine whether an execution could be so amended for the reason the objection that there was no seal was not specifically made in the circuit court, and, if the execution was amendable on the trial, such objection must have been specifically pointed out so that it might be obviated. The cases in this court were there reviewed, and it was held that, where the law expressly directs that the process shall be in a specific form and issued in a particular manner, such provision is mandatory, and a failure to comply with the law will render the process void. It was decided that such process cannot be amended after sale, and that a sale of land under such an execution is absolutely void, and may be successfully resisted in any kind of proceeding or in any forum in which the question may arise. No subsequent ²⁵⁵ amendment of such a writ could relate back and make valid a sale under such process. If no right passed by an attempted sale, no amendment could, by relation, cause something to pass. The execution was void, and the court did not err in overruling the motion for leave to amend.

Appellant also claims that appellees were estopped from questioning the validity of the sale: 1. Because they entered a motion in this case and in a chancery case to stay the levy and sale before

sale was made for other reasons than because the execution was void; 2. Because the Third National Bank, a judgment creditor of appellees, filed a petition in the case claiming the right to share in the proceeds of the sale under the execution, making appellees defendants, and this petition appellees failed to answer, though ruled to do so, and a decree was rendered in favor of the bank; and 3. That the sale was ratified by appellees, as they knew that appellant, the purchaser at the sale, relied on the sale as a satisfaction of his judgment and waived other means of satisfying it. These claims are not tenable. There was no misrepresentation by appellees, and there was nothing which they did which either induced or encouraged the appellant to act in any different manner from what he otherwise would. The means of ascertaining the fact as to the execution was open to appellant, and it was shown that appellees did not know, prior to the sale, that the execution lacked a seal. The appellees neither caused appellant to believe in the validity of the execution nor induced him to act upon such belief. The essential elements of an estoppel or waiver were lacking. In order to a waiver it must be shown that appellees knew their rights, and it is proved in this case that they did not. There is no element of estoppel, waiver, or ratification, and the judgment of the appellate court will be affirmed.

COURTS—SEALS.—A writ issued from a court having a seal is void unless attested thereby: Choate v. Spencer, 13 Mont. 127; 40 Am. St. Rep. 425, and extended note in which we endeavored to combat this ruling.

DICKEN v. McKINLEY.

[168 ILLINOIS, 318.]

WILL, AGREEMENT TO MAKE.—One may make a valid agreement to dispose of his property in a particular way by will, and such agreement may be enforced in equity after his decease against his heirs, devisees, or personal representatives. Such a contract is, however, looked upon with suspicion, and is only sustained when established by the clearest and strongest evidence.

STATUTE OF FRAUDS, AGREEMENT NOT TO MAKE A WILL.—An agreement by a grandmother, in consideration of her being permitted to adopt her grandchild, not to make any provision in her will depriving the child of any share in her estate, such estate consisting of both real and personal property, is within the statute of frauds, and, if oral, cannot be enforced.

STATUTE OF FRAUDS—CONTRACT, WHEN INDIVISIBLE.—A contract which respects both real and personal property as a contract to dispose or not to dispose of it by will is indivisible, and, if void under the statute of frauds because it affects real property, is also void as to personal property.

THE DEFENSE OF THE STATUTE OF FRAUDS MAY BE RAISED BY DEMURRER when the complaint shows that the contract was not in writing, as where it states that a contract not to disinherit a person by will was oral.

STATUTE OF FRAUDS, PART PERFORMANCE.—THE ADOPTION OF A CHILD and the permitting it to be adopted and its residing with the adopting person for six months before the death of the latter are not such acts of part performance as take out of the statute of frauds an oral agreement not to disinherit such child.

Suit in equity by Beulah C. Dicken, a minor child, to be decreed to be entitled to one-fifth of the estate, real and personal, of Serena Dicken, her grandmother. The father of the plaintiff had died, and she, as his child, was heir to one-fifth of her grandmother's estate. It was alleged that the grandmother desired to adopt the plaintiff as her child, and that in consideration of being permitted to do so, she verbally agreed with the plaintiff's mother and guardian that she, the grandmother, would not make any will which would deprive plaintiff of any part of her portion of the grandmother's estate, that in consideration of this promise, the plaintiff was permitted to be and was adopted by the grandmother, and thereafter resided with her as her child, but nevertheless, upon the death of the grandmother, it was found that she had left a will bequeathing the plaintiff the sum of one thousand dollars and devising to the other heirs all the residue of the estate. A demurrer interposed to the bill was sustained by the trial court, and the bill thereupon dismissed for want of equity, and a writ of error was sued out to review the decree of dismissal.

James A. Eads and Dundas & O'Hair, for the plaintiff in error.

Van Sellar, Shepherd & Van Sellar, for the defendants in error.

322 MAGRUDER, C. J. The weight of authority is in favor of the position, that a man may make a valid agreement to dispose of his property in a particular way by will, and that such contract may be enforced in equity after his decease against his heirs, devisees, or personal representatives: 22 Am. & Eng. Ency. of Law, 974, and cases cited in note 2; Schouler on Wills, 2d ed., sec. 454; Waterman on Specific Performance of Contracts, sec. 41; Fry on Specific Performance, 3d ed., sec. 223; Weingaertner v. Pabst, 115 Ill. 412. But such contracts are looked upon with suspicion, and are only sustained when established by the clearest and strongest evidence: Id. There is a want of harmony among the decisions in regard to the enforcement of such contracts when they are oral, and in regard to the scope and applicability to them

of the statute of frauds. Without entering into a discussion of the authorities upon the subject, we regard the case at bar as governed by the recent decision of this court in the case of *Pond v. Sheean*, 132 Ill. 312.

In *Pond v. Sheean*, 132 Ill. 312, a person, having no children of his own, took an infant daughter of a relative of his wife to raise as a member of his family, and promised orally, with his wife's consent, that if the child's father would permit her to become a member of his family, and assume the name of her adopter, and allow her to live with the family of the latter, he would, on his death and that of his wife, give the child all the property he might own; the contract was fully performed by the child and her father; she lived with her adopter from the time she was four years old until she reached the age of twenty-nine years, and was married, rendering, during all this time, the same services as though she was an own child; but it ³²³ was there held that a court of equity would not enforce a specific performance of the oral contract; that the agreement to make provision for the child by will was, so far as the real estate was concerned, an agreement for the sale of such real estate; that as the agreement was merely verbal and the child never obtained possession of the property under it, it was void under the statute of frauds; that payment of the purchase money without taking possession is not sufficient to take such a case out of the statute of frauds; and that a court of equity will not decree the specific performance of a parol agreement to convey lands where the purchaser has not entered into possession under the contract.

Here the adoption of the plaintiff in error by her grandmother did not require a change of name, because her name, as well as that of the grandmother, was Dicken; nor was her relation, as expectant heir of her grandmother in the event of the latter's death without making a will, changed by the adoption; because, as the only child of her deceased father, she would have inherited one-fifth of the estate of her grandmother, if the latter had died intestate, without any legal act of adoption; it was not necessary to adopt her to make her the heir of her grandmother; as adopted child she would inherit no greater interest than would have descended to her as grandchild. As the grandmother only lived about six months after the adoption, she received but little from the plaintiff in error in the way of services or companionship. But, even if the formal and perfected adoption was the consideration for the agreement alleged in the bill, and the deceased received and accepted such consideration, still the agreement was

not removed from the operation of the statute of frauds, any more than the payment of purchase money would have relieved it from such operation, because no possession was taken of the real estate by the plaintiff in error.

³²⁴ Counsel for plaintiff in error claim that *Pond v. Sheean*, 132 Ill. 312, is different from the present case upon the ground that here there were proceedings under the statute resulting in a legal adoption, while there no formal adoption took place. We regard this distinction as immaterial. The services of Mrs. Pond for twenty-five years in the case cited constituted a consideration as valuable as is a mere formal act of adoption. The material circumstance in the case at bar, as it was in *Pond v. Sheean*, 132 Ill. 312, is, that no possession was taken of the land under the contract, and, therefore, the contract was subject to the operation of the statute.

A further distinction is sought to be drawn between the two cases. It is said that, in *Pond v. Sheean*, 132 Ill. 312, the child was not a natural heir of the party making the promise, while here, by the death of her father, plaintiff in error, as his only child, was entitled to a child's share in the estate of the deceased grandmother, if she made no will; that the bill there sought to have property given to the child, which, by the course of descent, would go elsewhere, while here, plaintiff in error does not seek anything more than the law of descent would give her if the will of her grandmother should be set aside; and that the contract here is not one by which the decedent promised to devise something, but one by which she promised to allow the law of descent to distribute her property so far as plaintiff in error was concerned.

The contract, as set up in the bill, was one in which the deceased is alleged to have verbally contracted, not with plaintiff in error, but with the guardian and mother of plaintiff in error, that the deceased would make no will which would deprive plaintiff in error of any portion of the estate which she would take as heir if there was no will. The deceased unquestionably had a right to make a will and leave her property to others than her children or grandchildren; she had a right to leave it to whom she pleased. It is not alleged that she contracted ³²⁵ to make no will, but not to make a will giving plaintiff in error less than the law would give her. The contract was, in substance and effect, a contract that, if she made a will, she would make a will giving a certain portion of her estate, which consisted of realty and personalty, to the plaintiff in error. Such a contract is the same as

though she had agreed that, if she made a sale of her real property, she would sell it to plaintiff in error. We apprehend that there is no material difference, so far as the application of the statute of frauds is concerned, between an oral agreement by A to sell land to B at a certain price, and an oral agreement by A that, if he made any sale of his land at all, he would sell it to B at a certain price. Both of such oral contracts of sale are within the statute of frauds: *Farnham v. Clements*, 51 Me. 426.

If the verbal contract set up in the bill is not a verbal contract to devise to plaintiff in error a certain portion of her grandmother's estate, or, what is equivalent thereto, a verbal contract to make sale to her of a certain portion of the estate, then it is difficult to see upon what theory plaintiff in error claims to be entitled to the relief prayed for in her bill. The bill prays that the oral contract therein set forth may be enforced against the defendants. By the will of the testatrix, the title to the realty has passed to the defendants, her surviving children; and an enforcement of the contract against them would require them to convey to plaintiff in error the portion of the realty claimed by her. But this can only be done by charging the land in the hands of the defendants with a trust in favor of plaintiff in error. The theory, upon which the courts enforce an agreement to execute a will in a certain way against the representatives and estate of the party who makes the agreement is "to construe such an agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust upon it in ³²⁶ favor of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased": *Bolman v. Overall*, 80 Ala. 451; 60 Am. Rep. 107; 3 *Parsons on Contracts*, marg. p. 406.

The trust which is fastened upon the property in such case will necessarily be a trust growing out of a contract of sale. "If an owner of real estate contracts to sell it, he becomes a trustee of the legal title for the vendee; and if he died before conveying the legal title, . . . the heir, in case it descends, and the devisee, in case it is devised, may be called upon to convey it to the vendee": 1 *Perry on Trusts*, sec. 342. Such contract of sale, however, in order to affect land with a trust in favor of the vendee or promisee as against the vendor or his heirs or devisees, must be in writing, or attended with such acts of part performance as take it out of the statute of frauds. There are no such acts in this case. Nor can it be said that there is any trust growing out of fraud on the

part of the deceased or the defendants, because no fraud is charged in the bill.

Even if the contract here is, as counsel for plaintiff in error contend, a contract by which the deceased promised to let the statute of descents have its operation, and not a promise to make a devise in a particular way, it is, nevertheless, a merely verbal agreement, and, as such, could not have the effect of fastening a trust upon the real estate devised to the defendants. A trust which affects land must be in writing: *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642. Under "our statute of frauds, all trusts shall be created or evidenced by writing, except resulting trusts, or else they are void": *Hovey v. Holcomb*, 11 Ill. 660.

It has been said that a court of equity will sometimes interfere to enforce a verbal contract, void by the statute of frauds, where there have been such acts of performance by the party asking relief that he or she would suffer an injury amounting to a fraud by the refusal to execute the agreement: *Wallace v. Rappleye*, 103 Ill. 229; ³²⁷ *Pond v. Sheean*, 132 Ill. 312. No act of performance is alleged in the bill, except the act of effecting a statutory adoption. This act would not justify a court in holding that plaintiff in error has suffered an injury, amounting to fraud unless she is granted relief. Non constat that she was any worse off after the adoption than she was before.

The fact that the oral agreement set up in the bill may include personal as well as real estate does not take it out of the statute of frauds as to such personal estate. Being in part for a devise of land, and not being evidenced by any writing signed by the testatrix, it is within the statute; and as the contract is indivisible and fails in part, the whole fails: *Pond v. Sheean*, 132 Ill. 312; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125.

It is further urged that, in order to take advantage of the statute of frauds, it must be pleaded, or in some way set up at the trial, or it will be deemed to have been waived; and that it cannot be taken advantage of by demurrer to the bill.

We think that, in the present case, the question whether the contract is within the statute of frauds can be raised by demurrer. Where a bill shows affirmatively that a contract or promise to make a will is not in writing, the defense of the statute of frauds may be raised by demurrer: *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46. The bill here alleges that Serena Dicken verbally contracted.

Where the bill states facts, which are relied upon as part per-

formance for the purpose of taking the oral agreement out of the statute of frauds, and a demurrer is filed which admits such facts, the court must determine whether the facts relied upon do constitute part performance: *Van Dyne v. Vreeland*, 11 N. J. Eq. 378. And when the bill discloses an oral contract without alleging facts which would avoid the statute as a defense, advantage may be taken of the statute by demurrer: 8 Am. & Eng. Ency. of Law, 746. Here, the adoption, set up as part performance, does not amount, under the decisions ³²⁸ in this state, to such part performance as will avoid the statute as a defense. The defense of the statute of frauds may be taken by demurrer, where it appears from the face of the bill, as it does here, that the case stated is within the statute: *Story's Equity Pleading*, 9th ed., sec. 762, note a.

We think that there was no error in sustaining the demurrer and dismissing the bill. The decree of the circuit court is, accordingly, affirmed.

WILLS—CONTRACT TO MAKE—VALIDITY.—A person may make a valid agreement to make a particular disposition of his property by will: *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528, and note. A contract to make a will may be enforced, and, if not performed, a recovery may be had for its violation: *Huguley v. Lanier*, 86 Ga. 636; 22 Am. St. Rep. 487, and note. See, also, the extended note to *Johnson v. Hubbell*, 66 Am. Dec. 784-790.

WILLS—AGREEMENT TO MAKE—STATUTE OF FRAUDS.—An oral agreement between the mother of a child and one who adopts such child by legal proceedings, to the effect that the child shall inherit and be entitled to a share of the adopter's property as his heir, does not relate to a transfer of realty, or an interest therein, and is not affected by the statute of frauds: *Quinn v. Quinn*, 5 S. Dak. 328; 49 Am. St. Rep. 875, and especially note.

STATUTE OF FRAUDS—INDIVISIBLE CONTRACT.—If an entire and indivisible contract is partly within the statute of frauds, the whole is affected by the statute if part is by parol: *Haviland v. Sammis*, 62 Conn. 44; 36 Am. St. Rep. 330, and note.

STATUTE OF FRAUDS—PLEADING.—The benefit of the statute of frauds as a defense cannot be taken by demurrer, unless when it affirmatively appears by the bill and complaint that the agreement relied upon was not evidenced by a writing duly signed: *Speyer v. Desjardins*, 144 Ill. 641; 36 Am. St. Rep. 473, and note. See, also, the extended note to *Hotchkiss v. Ladd*, 86 Am. Dec. 685.

CHICAGO STREET RAILWAY COMPANY v. ROOD.

[163 ILLINOIS, 477.]

NEGLIGENCE, PRESUMPTION OF FROM THE HAPPENING OF AN ACCIDENT.—The mere happening of an accident, together with the exercise of ordinary care by the plaintiff, does not alone raise a presumption of negligence on the part of a common carrier.

STREET RAILWAYS—ACCIDENT, PRESUMPTION FROM. The happening of an accident to a passenger upon a street-car while he is in the exercise of ordinary care does not raise a presumption of negligence against a carrier, unless it appears that the circumstances attending the accident were such as to indicate that it would not have happened if the carrier had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to maintain such machinery or apparatus.

A STREET RAILWAY CORPORATION WILL NOT BE PRESUMED to have been negligent from the mere happening of an accident whereby a passenger, in the exercise of ordinary care and while riding upon a car of such corporation, was injured in a crowded street by being struck by a wagon or the harness of a team which was driven by some person not under the control of such corporation.

Action to recover for personal injuries claimed to have been received by the plaintiff, Rood, from the negligence of the defendant corporation. While the plaintiff was riding upon a car operated by the cable system of the defendant upon Cottage Grove avenue, a large wagon carrying coal brushed past his arm, and part of the harness, striking his foot, pulled it back, drawing him out of his seat, and bruising his leg by coming in contact with the iron side or arm of the seat. The plaintiff did not see the team or wagon before it struck him. The court, at the request of the plaintiff, instructed the jury as follows: "The court instructs the jury that if they believe from the evidence in this case, that the plaintiff, Rood, on August 26, 1892, boarded the cable-car of the defendant at or about Twenty-fifth street in this city on his way down town, and paid the price of transportation, to-wit, five cents; and that, while riding as a passenger and observing ordinary care for his personal safety, plaintiff's foot was brought in contact with a horse, harness, or wagon passing or standing at or near the tracks of the defendant, along which said cable-car was being operated by the defendant's servants; then to avoid liability for such injuries, the defendant must prove, by a preponderance of evidence, that its servants exercised the highest degree of care for the personal safety of the plaintiff in the operation of said cable-car at the time said injuries were inflicted." "The court instructs the jury, that, if they believe from the evidence that on August 26, 1892, the plaintiff in this case became a passenger and

paid his fare for transportation upon one of defendant's Wabash avenue cable-cars, and that, while so riding as such passenger and observing ordinary care for his personal safety, his foot and leg were injured by being brought in contact with something standing or passing near the tracks of the defendant, upon which said car was being operated by defendant's servants; then it is for the defendant to explain how such injury occurred, and to show, by a preponderance of the evidence, that the alleged injuries of plaintiff were not the result of any lack or failure to exercise the highest degree of care and diligence on the part of its servants in the operation of said cable-car." A verdict was returned in favor of the plaintiff for four thousand five hundred dollars, of which he remitted two thousand dollars, and a judgment was entered in favor of the balance. The defendant appealed.

William J. Hynes and H. H. Martin, for the appellant.

Mann, Hayes & Miller, for the appellee.

⁴⁸¹ MAGRUDER, C. J. By the giving of the instructions set out in the statement preceding this opinion, the court submitted the case to the jury upon the theory that, if the appellee proved that he was in the exercise of ordinary care at the time of the accident, there was a presumption that appellant was guilty of negligence, and accordingly that the appellant had the burden of proving, by a preponderance of evidence, that it was not negligent. The question presented for our consideration is, whether, in case of the happening of an accident to a passenger upon a street-car, the two concurrent facts of the accident and the exercise of ordinary care by the injured party raise a presumption of negligence against the carrier, so as to shift the burden of proof upon it to show that it was not guilty of negligence.

The weight of authority seems to be in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier. The rule is thus stated by Booth in his work on Street Railway Law, section 361: "The mere fact that a passenger has been injured en route, ⁴⁸² without any evidence whatever as to the manner in which the accident occurred, does not raise a presumption of negligence against either of the parties, but the burden of proof shifts where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it, or where it is caused by the mismanagement of a thing over which the defendant has immediate control,

or for the management or construction of which it is responsible." Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of vis major, or the tortious act of a stranger, tending to produce the accident, no such prima facie case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident, and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances, surrounding the accident, are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery, or safe apparatus, or if it had employed proper and competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage-coach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a collision between two ⁴⁸³ trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway: Bradner on Evidence, 422, 424; Ray on Negligence of Imposed Duties of Passenger Carriers, 690-697; Hutchinson on Carriers, secs. 799-801; Patterson on Railway Accident Law, 438; Smith v. St. Paul etc. Ry. Co., 32 Minn. 1; 50 Am. Rep. 550; Holbrook v. Utica etc. R. R. Co., 12 N. Y. 236; 64 Am. Dec. 502; Le Barron v. East Boston Ferry Co., 11 Allen, 312; 87 Am. Dec. 717; Transportation Co. v. Downer, 11 Wall. 129; Stokes v. Saltonstall, 13 Pet. 181; Stern v. Michigan Cent. R. R. Co., 76 Mich. 591; Wharton on Law of Negligence, sec. 661. It is reasonable that a presumption of negligence should arise against the carrier in cases where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury, and of explaining how it occurred, while the injured party is generally ignorant of the facts. But where the cause of the accident is outside of and beyond any of the instrumentalities under the control of the carrier, its means of knowl-

edge may not be and are not necessarily better than those of the passenger. In the present case, the car in which the appellee was riding was traveling along the public street of a city, which the owners of other vehicles had as much right to use as the owners of the cable-cars. Plaintiff's own testimony showed that he was injured by a wagon traveling along the public street, and passing the car in which he was riding. The accident may have been due, so far as plaintiff's evidence showed, to careless driving on the part of the driver of the wagon. Plaintiff's proof was equally consistent with the absence as with the existence of negligence on the part of appellant: *Hutchinson on Carriers*, sec. 799. At any rate, such evidence left it doubtful whether appellant was guilty of negligence or not, and the presumption that the accident was unavoidable, was as reasonable as that it was due to appellant's negligence: *Stern v. Michigan Cent. R. R. Co.*, 76 Mich. 591. Under such circumstances, the nature of the ⁴⁸⁴ accident was not such as to throw the burden of proof upon the appellant.

In *Federal Street etc. Ry. Co. v. Gibson*, 96 Pa. St. 83, a passenger on the car of a street railway company was struck and injured by a passing wagon loaded with hay, while sitting in the street-car by an open window, with his left arm resting on the window ledge, it not being shown whether it projected beyond the ledge or not; and it was held by the court that the approximate cause of the injury, at least in part, was the act of a third party, to wit, the driver of the wagon, over whom the railroad company had no control; and that, under the circumstances, the presumption of negligence on the part of the company did not arise, but that the duty rested on the passenger to prove the negligence of the company. There was there no privity of contract between the company and the driver of the wagon, as there is none in the case at bar: *Hawkins v. Front Street etc. Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72; *Saunders v. Chicago etc. Ry. Co.*, (N. D. 1895), 60 N. W. Rep. 148; *Potts v. Chicago City Ry. Co.*, 33 Fed. Rep. 610.

The same doctrine announced in the authorities herein before referred to is the doctrine of this court, as will be seen by reference to the following cases: *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486; *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40; *Hart v. Washington Park Club*, 157 Ill. 9; 48 Am. St. Rep. 298. In *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486, the facts showed that the plaintiff, at the time he was injured, was a passenger on one of the defendant's street-cars run by a cable, and was standing on the rear platform of the car and while in that position, as he was passing through the La Salle street tunnel, he was

run into by another of the defendant's cars following on the same track, and thereby received the injuries complained of. In that case, it will be noticed that the collision was between two cars, both of which belonged to the defendant company, and that ⁴⁸⁵ the collision was not between one of the defendant's cars and a vehicle which was not under the control of the defendant; in that case we said: "There seems to be a very general concurrence of authority that where there was an absence of vis major, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that the defendant acted negligently." In *Chicago etc. R. R. Co. v. Blumenthal*, 160 Ill. 40; it was held that a prima facie case of negligence on the part of the railroad company arises when a passenger on a freight train, in charge of cattle, is injured by being caught between two cars while he is descending the ladder to look after his cattle during stoppage of the train for water. But, there the cars and their couplings or bumpers, and the ladder upon which the passenger was descending, belonged to, and were under the control of, the defendant company; and we said that a prima facie case of negligence was made out in view of the manner and circumstances of the accident, it appearing that the injury to the passenger was caused by apparatus wholly under the control of the carrier, and furnished and applied by it; it was there held that the nature and circumstances of the accident were such as to throw upon the railroad company the burden of proving that the injury was not its fault. In *Hart v. Washington Park Club*, 157 Ill. 9; 48 Am. St. Rep. 298; we also held that "the presumption of negligence arises, not exclusively from the fact that the accident happened, but that it happened under given conditions and in connection with certain circumstances." Where the accident is one which would not in all probability happen if the person causing it was using due care, or the instrumentality causing the accident is solely under the management of the defendant, then the occurrence of the accident, together with proof of the exercise of due care on the part of the plaintiff is sufficient prima facie proof of negligence to impose upon the defendant the onus of rebutting it.

⁴⁸⁶ For the reasons above stated, we think that the instructions given for the plaintiff, in stating the rule without the qualifications herein indicated, stated it too broadly. There was no instruction given for the appellant which cured the error involved in the instructions thus given for the appellee. The jury might well have believed that the mere fact of the injury did not create a

presumption of negligence against the defendant or its agents, and yet may have believed that the fact of the injury, coupled with the exercise of due care by appellee for his personal safety, did create such presumption.

In view of the error herein pointed out, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

NEGLIGENCE—PRESUMPTION OF FROM HAPPENING OF ACCIDENT.—A presumption of negligence may arise from an accident, and if the circumstances are of such a nature that it may be fairly inferred from them that the reasonable probability is that the accident was caused by the failure of a party to exercise proper caution a presumption of negligence arises: *Hawser v. Cumberland etc. R. R. Co.*, 80 Md. 146; 45 Am. St. Rep. 332, and note. This subject is fully discussed in the extended notes to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490, *Huey v. Gablenbeck*, 6 Am. St. Rep. 794, *Ingalls v. Bills*, 43 Am. Dec. 363, and the note to *Alabama etc. R. R. Co. v. Hill*, 30 Am. St. Rep. 78.

STREET RAILWAYS—PRESUMPTION OF NEGLIGENCE FROM HAPPENING OF ACCIDENT.—In an action against a street railway company for personal injuries caused by the derailment of a car, the burden of proof lies on the carrier to rebut the presumption of negligence which is raised by the occurrence of such an accident: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; 38 Am. St. Rep. 753; note to *Alabama etc. R. R. Co. v. Hill*; 30 Am. St. Rep. 78; but the fact that a passenger on a cable-car in a city is injured without fault of his own does not raise a presumption of negligence casting the burden of proof on the railway company to disprove it: *Hawkins v. Front Street etc. Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72. See, also, the extended note to *Memphis etc. Packet Co. v. McCool*, 43 Am. Rep. 73.

SHEFFER v. WILLOUGHBY.

163 ILLINOIS, 518.]

IF A RESTAURANT KEEPER FAILS TO EXERCISE ORDINARY CARE in furnishing food to his patrons, whereby damages result to them, he is answerable, but he is not liable except for want of such care, and a person suing to recover damages for being furnished unwholesome food, through the eating of which he was made ill, must assume the burden of proving carelessness or negligence on the part of the keeper of the restaurant.

A RESTAURANT KEEPER IS NOT AN INSURER OF THE FOOD furnished to his patrons, and therefore is not liable if they are made sick by eating it, unless he has been guilty of negligence.

Action on the case to recover damages claimed to have resulted from the eating of oysters served by the defendants at their restaurant in the city of Chicago. The evidence showed that the defendants were the proprietors of a public restaurant known as the

"Boston Oyster House," furnishing to their patrons, among other things, oyster stews; that on the day named in the complaint, plaintiff was one of their patrons, and as such was furnished an oyster stew, and that shortly after eating the same she became sick and suffered great bodily injury and physical and mental pain. There was no other evidence at the trial, other than that of the illness of the plaintiff following the eating of the stew, and the fact that it had a peculiar and brassy taste, tending to show any negligence or want of care on the part of the defendants. The court, therefore, instructed the jury to return a verdict in their favor, which, being done, the plaintiff appealed.

Edwin F. Abbott, for the appellant.

Duncan & Gilbert, for the appellees.

521 CRAIG, J. Whether plaintiff became sick from eating the oyster stew at the defendants' restaurant was a question for the jury, and while the evidence produced by plaintiff that eight or nine hundred persons were served with oyster stews at the same time and place, and none of whom became sick, would seem to be a strong circumstance tending to establish that plaintiff's sickness was attributable to other causes, yet we are inclined to the opinion that, if plaintiff had made out her case in other respects, it would have been the duty of the court to submit this question to the jury. It will be observed that plaintiff, in her declaration, averred that defendants, as restaurant keepers, served plaintiff with oysters, and "carelessly, negligently, and unskillfully, and through carelessness," did "deliver to plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, and deleterious, dangerous, and poisonous," etc., whereby plaintiff became sick. This was, no doubt, regarded by plaintiff as a material averment, and it was a material averment—one upon which the right of recovery of plaintiff rested—and unless the evidence fairly tended to establish negligence on the part of defendants, plaintiff could not recover.

522 But it is said in the argument that "innkeepers are prima facie liable for losses which happen to the goods of their guests, and on the same principle restaurant keepers should be prima facie liable for injury resulting from unwholesome food furnished by them." The law is well settled that the keepers of public inns are required to safely keep the property of their guests, and, in case such property is lost, the innkeeper can only relieve himself from liability by proving that the loss occurred without any fault on his part, or that the loss occurred through the fault of his

guest, and the burden of proof to exonerate the innkeeper is upon himself, for the reason the law, in the first instance, will attribute the loss to his default: *Johnson v. Richardson*, 17 Ill. 302; 63 Am. Dec. 369. As respects the goods of a guest which he takes with him when he stops at an inn, the innkeeper is practically an insurer, and where an action is brought to recover for goods lost, the guest is only required to show the existence of the relation of innkeeper and guest, and the loss, to authorize a recovery. But as to food served at a restaurant, such as oysters, ice cream, and the like, we are not aware that a similar rule establishing liability ever existed. There is no similarity between the two cases, and the principle that governs one does not apply to the other. If a person keeping a public restaurant fails to exercise ordinary care in furnishing food to his patrons and damages result, he will be liable, if his business be conducted in a careless or negligent manner, and through such negligence a patron is injured. But, where an action is brought to recover damages, the burden is upon the person bringing the action to establish carelessness or negligence.

Plaintiff claims that having proven that she ate the oyster broth at defendants' restaurant, and in consequence became sick, her case is made out, or, at least, the burden of proof is shifted on defendants. If this rule were adopted, plaintiff would be relieved from proving the most important element of her declaration—the negligence ⁵²³ of defendants—which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct on principle, nor has it been sustained, so far as we are advised, by any respectable authority: *Weideman v. Keller*, 58 Ill. App. 382—a case cited by appellant—was one where the plaintiff brought an action against a retail dealer in meats to recover damages resulting from eating pork containing trichina, sold to him by the dealer. In deciding the case, the court held that when a vendor of provisions has no notice, and cannot, by the exercise of reasonable or ordinary care, ascertain the unwholesome or unsound condition, there is no implied warranty of the soundness of the provisions not prepared or manufactured by such vendor. Here there is no pretense that defendants manufactured either the oysters or the milk—the two ingredients of the oyster stew—and under the rule laid down in the case cited there could be no liability.

Plaintiff has cited *Van Bracklin v. Fonda*, 12 Johns, 468, 7 Am. Dec. 339, as an authority. But that was an action brought against a person for selling a quarter of beef as good and sound when it was bad and unwholesome, but it was proven that the vendor

knew, when he sold the beef, that it was diseased, and, while the rule laid down in that case is proper under the facts, it has no application to this case. Here plaintiff called but one witness to prove negligence or carelessness on the part of defendants, and, upon an examination of the evidence of the witness, it will be found it does not tend to show that defendants were guilty of any negligence or carelessness.

As plaintiff failed to introduce any evidence tending to prove the most material averment of her declaration, the instruction of the court to find for defendants was correct.

The judgment of the appellate court will be affirmed.

NEGLIGENCE—SALE OF IMPURE FOOD.—One who negligently sells meat that is dangerous to those who eat it is liable for the consequences of his act if he knew it to be dangerous or by proper care could have discovered its condition: *Craft v. Parker*, 96 Mich. 245. A public caterer employed to furnish refreshments at a public ball is liable for an injury suffered by one attending by reason of unwholesome provisions furnished by him: *Bishop v. Weber*, 139 Mass. 411; 52 Am. Rep. 715. In the sale of provisions for domestic use there is an implied warranty that they are sound and wholesome: *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 339, and note.

GLOBE ACCIDENT INSURANCE COMPANY v. GERISCH.

[163 ILLINOIS, 625.]

EVIDENCE.—STATEMENTS MADE TO A PHYSICIAN SEVERAL HOURS after an accident form no part of the *res gestae*, and therefore are not admissible as evidence against an accident insurance company for the purpose of proving the cause of the injury.

EVIDENCE OF INJURY THROUGH ACCIDENT, WHAT SUFFICIENT.—Where it is claimed that an injury resulting in the death of the insured consisted of a strain received while carrying a box of ashes and cinders, the jury may be warranted in inferring that the deceased lifted and carried out such box, if it appears that it was his duty to have done so, that he was in the habit of doing so every evening, that on the evening when he was claimed to have been injured he was seen shoveling ashes and cinders into a wooden box in which he usually carried them, that they were actually carried out by some person on that evening, and that during the same evening he complained of pain in the lower part of the abdomen, which continued to increase until he died, and the physicians attending upon him all testified that his condition was the result of some strain or external violence; but this evidence does not warrant the further presumption that from his carrying out of the box a strain resulted and that this in turn was the cause of his death.

A PRESUMPTION CANNOT BE BASED UPON ANOTHER PRESUMPTION, because there is no visible connection between the facts out of which the first presumption arises, and the fact sought to be established by the dependent presumption.

ACCIDENT INSURANCE, NOTICE OF INJURY.—If a policy of insurance provides that unless the claimant gives notice within seven days, stating the cause of injury, and within ninety days of the date of the injury and within thirty days of the date of the death verified proof thereof, all claims therefor shall be forfeited, an administrator suing upon a policy is not required to have given notice within seven days after the injury. This provision does not apply to actions by persons other than the assured himself.

ADMINISTRATORS—RELATION—INSURANCE.—A grant of letters of administration relates back to the death of the intestate, and validates all acts which come within the scope of an administrator's authority and which were in their nature beneficial to the estate, and therefore validates proofs made by such administrator before his appointment and after the death of the intestate for the purpose of enforcing a policy of insurance.

John Root and N. F. Anderson, for the appellant.

E. A. Corbin and Thompson, Shumway & Wasson, for the appellees.

627 BAKER, J. This action was upon a policy of accident insurance issued to Philip Gerisch, the plaintiff's intestate. The declaration averred that the deceased accidentally, severely, and fatally strained and injured his body in the abdominal region by lifting a box of ashes and cinders, from which strain and injury he died. The cause was tried in the Canton city court before the court, without a jury. After plaintiff had rested her case the defendant demurred to the evidence, but the court overruled the demurrer, found the issues for the plaintiff, and rendered judgment in her favor for two thousand dollars, and that judgment has been affirmed by the appellate court.

The important question is, whether the evidence sufficiently tends to show that the death of the deceased was caused in the manner alleged in the declaration.

The statements made by Gerisch to his physician, and to other persons, in regard to the cause of the injury from which he was suffering, were received in evidence by the trial court over the objection of the defendant. None of these statements were made until several hours, and most of them two or three days, after the supposed accident. They formed no part of the *res gestae*, and under no rule of law are they competent evidence: *Chicago etc. Ry. Co. v. Becker*, 128 Ill. 545; 15 Am. St. Rep. 144. Nor is there an exception made in favor of the statement made to his physician. Had such statement related only to the part of his person that was hurt, his sufferings, symptoms, and the like, it would be competent evidence; but the declaration of the insured as to the cause of his injury is not proper or competent evidence. Whatever the rule may be in other jurisdictions, such is the law

in this state: Illinois Cent. R. R. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Collins v. Waters, 54 Ill. 485.

⁶²⁸ But, excluding these statements from consideration, is there sufficient other evidence to establish prima facie the case stated in the declaration? The demurrer, of course, admits all that the competent evidence proves or tends to prove.

It was the duty of Gerisch, in pursuance of a contract with one Jacobs, to carry out the ashes and cinders from the furnace of the latter's greenhouse to the street, about seventy feet distant, and he was in the habit of doing so every evening. On the evening on which it is claimed he was injured, he was seen shoveling the ashes and cinders from the furnace into a wooden box, in which he usually carried them out into the street. The box held about one and one-half buckets, and was then nearly full. No one saw him lift the box or carry out the ashes. Still, the ashes were, as matter of fact, carried out that evening. Although there is no direct evidence that Gerisch lifted the box and carried out the ashes, yet, from the facts and circumstances above stated, the presumption that he did so could fairly be drawn. Such a conclusion is both reasonable and natural. About half-past nine o'clock that evening, but just how long after he was seen shoveling the ashes does not appear, he complained of pains in the lower part of the abdomen, which continued to increase in severity until the second day thereafter, when he took to his bed and a few days later died.

Several physicians were in attendance at the bedside of Gerisch, all of whom testified at the trial. It seems that two days before his death, as a last resort, they performed a surgical operation upon him, and their testimony is based, to a considerable extent, upon the information obtained from an examination of the injured parts. They all agree that the cause of his death was intense inflammation and strangulation of the intestines, and that the diseased condition arose from the dropping of the bowels through an adhesive band—an unnatural growth—which extended from the wall of the abdomen ⁶²⁹ across to the intestines. They further agree that some force or muscular shock was required to push the bowel through this band, and give it as their opinion that some strain or external violence caused the injury which resulted in their patient's death. This evidence is sufficient, when uncontradicted, to make out the point sought to be established by it—that is, that Gerisch was strained or was injured by some external force. There is, however, no proof that the deceased strained and injured his body "by lifting a box of cinders

and ashes," and one essential fact—indeed, the all-important fact—is therefore wanting in order to make out this case. If, from the fact that he lifted a box of ashes and from the further fact that he, not long afterward, suffered from the effects of a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied. But this presumption cannot be indulged. As we have seen, the fact upon which it is sought to base this presumption, viz., that Gerisch lifted the box, is itself but a presumption drawn from other facts in evidence, and the law is, that a presumption cannot be based upon a presumption, for there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption: *Douglass v. Mitchell*, 35 Pa. St. 440; *United States v. Crusell*, 14 Wall. 1; *United States v. Ross*, 92 U. S. 281. In the case last cited, it is said, in passing upon this question: "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed." The record, therefore, does not make out a *prima facie* case for the plaintiff, and the trial court erred in overruling the demurrer to the evidence.

⁶³⁰ It is contended by the defendant that the policy was forfeited because the plaintiff gave no notice to the company within seven days, etc. The provision of the policy upon which this point is based is as follows: "Unless claimant gives home office, at Indianapolis, within seven days, written notice, stating name, address, occupation, date and causes of injury, and within ninety days from date of injury and within thirty days from date of death verified written proof thereof, all claims therefor shall be forfeited." The policy was payable, in case of the death of the insured, to his legal representative. Now, Gerisch died on the seventh day after he was injured, and within thirty days after his death the plaintiff caused "verified written proof thereof" to be sent to the defendant at its home office in Indianapolis. But the point made is, that she did not send written notice to the company of the fact of the injury within seven days after the injury occurred. The plaintiff did not become the "claimant" until she had taken out letters of administration, and there was consequently no "claimant" within seven days from the date of the injury. It is clear that this provision for notice within seven days can-

not apply to her. It is applicable to the insured, only, and not to his legal representative. No other construction of it is reasonable. Moreover, this clause in the policy is for a forfeiture, and is in the form and phrases adopted by the company, and, if it is of uncertain meaning, it must be construed most strongly against the company.

It might be suggested that if the plaintiff did not become the claimant until she had taken out letters of administration, then, since she did not take out such letters until several months after the death of the insured, the "verified written proof" of death necessary to be sent to the company within thirty days from the date of death did not meet with the requirement of the policy that it be sent by the "claimant." But a well-settled principle of law here comes to the plaintiff's assistance. It is the ⁶³¹ doctrine of relation. Under it the grant of letters of administration related back to the date of the intestate's death, and validated all acts which came within the scope of an administrator's authority, and which were, in their nature, beneficial to the estate. She became "claimant" by relation from the death of the intestate: *Makepeace v. Moore*, 5 Gilm. 474; *Wells v. Miller*, 45 Ill. 382; 7 Am. & Eng. Ency. of Law, 194, and cases cited in note 1. It follows there was no forfeiture of the policy.

For the errors indicated herein, the judgments of the appellate court and of the Canton city court are reversed, and the cause is remanded to the latter court for a new trial.

EVIDENCE—STATEMENT—RES GESTAE.—The declarations of an injured person to a physician as to the cause and circumstances of the injury are not admissible if not made until he has been removed and the physician has been called: *Merkle v. Bennington*, 58 Mich. 156; 55 Am. Rep. 666, and note. Declarations of a party injured by a railway train as to how he received the injury, made when he was first picked up at the scene of the accident, surrounded by parties who witnessed it, are admissible as part of the *res gestae*, but his declarations made twenty minutes after, when he had been removed fifty or seventy-five feet, are inadmissible: *Leahey v. Cass Avenue etc. Ry. Co.*, 97 Mo. 165; 10 Am. St. Rep. 300, and note. In an action against a railway company for personal injuries, declarations made by the plaintiff half an hour after the accident as to the manner of his leaving the train and receiving the injury are inadmissible as part of the *res gestae*: *Savannah etc. Ry. Co. v. Holland*, 82 Ga. 257; 14 Am. St. Rep. 158, and note; *Waldele v. New York etc. R. R. Co.*, 95 N. Y. 274; 47 Am. Rep. 41, and note. See, also, the notes to *Hinchcliffe v. Koontz*, 16 Am. St. Rep. 407; *Chattanooga etc. R. R. Co. v. Liddell*, 21 Am. St. Rep. 178, and *Central R. R. v. Smith*, 2 Am. St. Rep. 39.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

TALBOTT v. BARBER.

[11 INDIANA APPEALS, 1.]

TRUSTS—PROCEEDS OF LAND—CONSIDERATION.—While an express trust in land cannot be created by parol, a parol agreement to hold the proceeds of a sale of the land, in trust for another is valid, if based upon a sufficient consideration. The conveyance, by a wife, of her inchoate interest in land is sufficient consideration to establish such a trust.

TRUST—PROCEEDS OF LAND—CONSIDERATION.—If a married woman joins in the execution of a mortgage of her husband's land, this is sufficient consideration for an agreement by the mortgagee to foreclose the mortgage, purchase the land at foreclosure sale, and pay her one-third of the proceeds of such sale.

TRUSTS—RIGHTS OF PARTY ACQUIRING LAND IMPRESSED WITH.—A devisee of land impressed with a trust to pay another a certain portion of the proceeds of a sale thereof takes the land charged with, and subject to, such trusts, of which he has actual or constructive notice.

TRUSTS.—STATUTE OF LIMITATIONS does not begin to run against a continuing or executory trust, until a disavowal of the trust or a refusal to perform upon proper demands.

TRUSTS.—STATUTE OF LIMITATIONS does not begin to run against a continuing or executory trust to pay a certain portion of the proceeds of a sale of land, even after the sale, until there is a disavowal of the trust, or a refusal to perform upon proper demand.

JUDGMENTS BY DEFAULT—ESTOPPEL.—A judgment by default in foreclosure against a married woman who executed the mortgage foreclosed in consideration of an agreement that the mortgagee would foreclose, purchase the land, and pay her a certain part of the proceeds thereof, does not estop her from claiming the benefit of such agreement and maintaining suit thereon.

WITNESSES—COMPETENCY—DISCRETION OF COURT.—If the plaintiff has prima facie established his case by competent evidence, the court may, in its discretion, and of its own motion, permit the plaintiff, otherwise incompetent under the statute, to give his version of the transaction in dispute.

B. Crane and A. B. Anderson, for the appellant.

G. W. Paul and A. D. Thomas, for the appellee.

³ REINHARD, J. The appellee filed a claim against the estate of appellant's decedent. The statement of the claim consisted of a complaint in one paragraph, to which a demurrer was filed and overruled. The appellant then filed an answer in five paragraphs, the first being a general denial, and the others pleas of the statute of limitations of six, ten, and fifteen years, respectively, excepting the fifth paragraph, which was an answer of *res adjudicata*. Demurrers were sustained to all the affirmative answers but the fourth paragraph, and proper exceptions were reserved to all the adverse rulings by the appellant. A reply of general denial placed the cause at issue. The first error assigned and discussed assails the ruling upon the demurrer to the complaint.

The substance of the complaint is, that during the year 1872 the appellee, Susan Barber, was the wife of Thomas Barber, then alive, but since deceased; that she and her said husband then resided in Hendricks county, Indiana; that her said husband was then the owner in fee of one hundred and sixty acres of land in Hendricks county, Indiana, of the value of seven thousand five hundred dollars, in which the appellee then had her *inchoate* right and interest as the wife of said Thomas Barber. Then follows a description of the land, which we omit.

It is then averred that while appellee and her said husband were in possession of said land, he being the owner as aforesaid, to wit, on the second day of October, 1872, her said husband was indebted to Jesse Durham, the husband of the decedent, Isabel Durham, in the sum of four thousand dollars, evidenced by the promissory notes of said Thomas Barber for said amount; that said Thomas Barber was largely indebted to other persons far above ⁴ his ability to pay, and said Jesse Durham was urging said Thomas Barber to execute to him a mortgage on said lands to secure his said debt and give him a preference over other creditors, and on the sixth day of March, 1873, said debt to said Jesse Durham being still unpaid, the said Thomas Barber agreed to execute to him a mortgage on said lands to secure said debt, and that then the said Jesse Durham came to the appellee (then the wife of said Thomas Barber) and requested her to sign said mortgage with her said husband, which she refused to do; that said Jesse Durham, being desirous of obtaining a mortgage on the entire interest in said lands to avoid any trouble in

regard to the title in making sale of the same, said Jesse Durham then and there agreed with the appellee that in consideration of her signing said mortgage with her husband, and of her agreement then made that she would not appear to or resist a foreclosure of said mortgage, and her agreement not to redeem from said sale to be made on the foreclosure of such mortgage, he, the said Jesse Durham, agreed that he would take and foreclose said mortgage and purchase said lands at the sheriff's sale to be made on such foreclosure, and hold one-third of said land for the appellee, and would protect her one-third inchoate interest therein, and that as soon as he could sell said land he, the said Jesse Durham, would pay the appellee one-third of whatever should be realized from a sale of said lands when the same should be sold; and that appellee reposed great confidence in said Durham, and relying on his said promises and agreements, and by reason of the confidence she reposed in him, and without any other consideration whatever, signed and executed said mortgage with her said husband, and that appellee fully performed all and every part of said agreement on her part, and that said agreements were entered into without any ⁵ fraudulent intent; that said Durham received and accepted said mortgage under said agreement, and afterward foreclosed the same in the Hendricks circuit court, in the state of Indiana, and caused a certified copy of the decree of foreclosure to be issued by the clerk of said court to the sheriff of the proper county; that after the sheriff had duly advertised said lands for sale under said decree, and on the day set for the sale of said lands, the said sheriff duly offered the same for sale to satisfy said decree, and said Jesse Durham bid therefor the sum of said debt and costs, and, he being the highest and best bidder therefor, the said sheriff struck off and sold the said land to said Jesse Durham and issued to him a certificate of purchase under said decree; that afterward, and before the year of redemption had expired, in pursuance of said agreement, and to enable said Durham to make sale of said land, the appellee and her husband surrendered the possession of said land to said Durham, and he leased the same to a tenant, and, before the year of redemption had expired, said Jesse Durham died testate, having, by his will, duly probated in Montgomery county, Indiana, bequeathed and devised to said Isabel Durham, the decedent, all his interest in all said lands, and that she took possession of the same and received the said certificate of purchase therefor, and that afterward, on the sixteenth day of July, 1875, obtained a sheriff's deed for said lands, without paying any consideration for the same; that she had full notice and knowl-

edge of the aforesaid facts and agreements between appellee and said Jesse Durham, and that said Isabel Durham received the rents and profits of said lands for thirteen years, to the amount and value of four hundred dollars per year, and that on the first day of August, 1888, said Isabel Durham sold and conveyed said lands to one Matthias A. Roof, and received the entire purchase price therefor, amounting to eight thousand dollars, and held and ⁶ retained the same until the time of her death, although the appellee, after said sale, often requested her to pay one-third of the purchase-price of said lands to her, which she neglected to do, and that there is due the appellee one-third of said eight thousand dollars, to wit, two thousand six hundred and sixty-six dollars and sixty-six cents, and one-third of the rents of said land, together with six per cent interest thereon from the date of said sale. Wherefore she prays judgment for four thousand dollars and all proper relief.

It is earnestly contended that the complaint seeks a recovery on an express trust created by parol, which is in violation of the plain provisions of the statute: Rev. Stats. 1894, secs. 3391, 6631 (Rev. Stats. 1881, secs. 2969, 4906).

The section first cited is as follows: "No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

The last section referred to reads thus: "Every conveyance of any existing trust in lands, goods, or things in action, unless the same shall be in writing, signed by the party making the same or his lawful agent, shall be void."

It is plain, to our minds, that the mortgage executed by the appellee and her husband under the alleged agreement was not the creation of a trust in or concerning lands within the meaning of either of the sections quoted.

Nor do we think it was a trust "in goods or things in action," as contemplated by the section last above set out. It can certainly not be maintained that under the agreement the mortgagee was to hold the title of the land for the benefit of the appellee. Whatever right or title she had in such land she conveyed away by the ⁷ execution of the mortgage and the agreement not to defend the foreclosure, and not to redeem. By the terms of the agreement, Jesse Durham not only acquired the legal title but also the absolute right to dispose of the same at his own will and pleasure. The only thing he was required to do was to hold for and pay to the appellee one-third of the proceeds of the sale. It is true there

is an averment that he agreed to "hold" a one-third interest in the land for the appellee, and that he would "protect" her one-third interest, but all this must have reference to the proceeds of the sale as is clearly indicated in the last portion of the alleged agreement in which he promised to "pay" her one-third of whatever should be realized from the sale.

Such an agreement is not void by the statute as an express trust in real estate. While an express trust in land cannot be established by parol, a parol agreement to hold the proceeds of a sale of the land, in trust for another is valid, if based upon a sufficient consideration. Such an arrangement may constitute a trust in the proceeds of the sale, that is, in the money realized from the sale, but not an express trust in the land: *Mohn v. Mohn*, 112 Ind. 285; *Worley v. Sipe*, 111 Ind. 238; *Thomas v. Merry*, 113 Ind. 83. It is not necessary to cite authorities to the proposition that the conveyance of appellee's inchoate interest is a sufficient consideration for the agreement relied upon in the complaint: See, however, *Worley v. Sipe*, 111 Ind. 238.

Appellant's counsel contend that the cases above cited do not support the position that a trust may be established and enforced in the proceeds of a sale of land, unless it be on the condition that the grantee, subsequently to the sale of the land, agree to hold such proceeds in trust for the grantor or person designated by him. In this construction of the decisions referred to, ⁸ we think counsel have misapprehended the ruling of the court. We understand the rule to be that even though the original agreement establish a trust in land, which is not enforceable under the statute, yet, if after the sale the grantee agrees to hold the proceeds in trust for the person designated, equity will enforce such a trust notwithstanding the statute, the original agreement being a sufficient consideration therefor. But we do not understand that if the original agreement itself relates to the proceeds, there must be another promise after the sale is made. The general rule in such cases is applied that a trust in personal property, of the character of the one in the present case, may be enforced, if founded on a sufficient consideration. Here there was no agreement, at any time, that Durham should hold a part of the land itself in trust for the appellee.

The latter, as we have found, parted with her title as fully as if she had made an absolute conveyance of the property. The only agreement tending to create a trust related to the proceeds arising out of a sale of the land, and not to the land itself, and we can see no good reason why such an agreement, made in the first in-

stance, and before the conveyance, should not be as capable of being enforced as one made after the sale of the land, which was itself the subject of a trust.

Counsel for appellant insist that to establish a resulting trust in such a case as this the transaction must be tainted with fraud, or some fraudulent act must be shown to have been committed by the grantee. We do not think this was necessary. It is sufficient to bring the facts within the rule if the transaction would result in a fraud upon the grantor, for the statutes of frauds and trusts cannot be used as instruments to work a fraud: *Marcilliat v. Marcilliat*, 125 Ind. 474; *Catalani v. Catalani*, 124 Ind. 54; 19 Am. St. Rep. 73; *Stuart v. Brown*, 135 Ind. 232.

9 It is further contended by appellant's counsel that if there was any liability at all it was for a portion of the purchase money, and that for this the estate of Jesse Durham alone could be held, and a claim for the same against the estate of his wife cannot be enforced.

The appellant's decedent, in the case before us, cannot be placed in the position of an innocent purchaser of the lands without notice. She took the real estate as a devisee of Jesse Durham, to say nothing of the averment that she had full notice and knowledge of the trust. She could acquire no greater right in the proceeds of the sale than her husband would have acquired. Whenever she sold the land and collected the proceeds the latter were charged or impressed with the trust in the hands of Isabel Durham.

The rule in such cases is explicitly and correctly stated by a standard author: "Whenever property, real or personal, which is already impressed with . . . a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, and compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of

positive ¹⁰ fraud or actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice": 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1048.

Nor do we think the complaint discloses that the action is barred by the statute of limitations. The facts averred show that the appellee retained an interest in the proceeds of the land for which she conveyed her inchoate interest, and whenever such proceeds were realized by the sale of the land, Jesse Durham, or his devisee, became obligated to account for the trust. The trust was a continuing or executory one, and the statute did not begin to run, even after the sale, until there was a disavowal of the trust or the refusal to perform upon proper demand: *Parks v. Satterthwaite*, 132 Ind. 411.

It is alleged in the complaint that the appellant's decedent sold the land on the first day of August, 1888, receiving therefor the entire proceeds of eight thousand dollars, and that she held the same up to the time of her death. The complaint was filed March 31, 1892, which was less than four years after the sale. We think the complaint states a cause of action, and the demurrer was properly overruled.

What we have already said disposes of the alleged errors of sustaining demurrers to the paragraphs of answer setting up the various statutes of limitations. As we have seen, the agreement declared upon was more than a mere promise to pay the purchase money, but was the establishment of a trust in the proceeds of the sale of one-third of the land. This trust being an executory one, the statute of limitations has not barred a recovery.

The plea of *res adjudicata*, to which a demurrer was ¹¹ sustained, was clearly insufficient. The gist of it is, that the appellee was duly served with process in the foreclosure proceedings, but failed to appear, and that judgment was rendered against her by default. This, however was one of the very things she contracted to do, according to the averments of the complaint, and it was partly this agreement not to appear which constituted the consideration of the trust. It is doubtless true, as a general rule, that where the wife of a mortgagor of real estate, in which she has an inchoate interest, is brought into court by summons in a foreclosure proceeding and fails to set up any claim or interest she is concluded by the decree. But this rule can have no application to the facts in the present case. We apprehend that no court would debar a litigant, who, by special agreement, suffered de-

fault and judgment to be taken against him in consideration of some benefit inuring to him, from showing that fact.

The answer under consideration is not any different from the averments of the complaint in reference to the facts touching the decree of foreclosure, and, if the complaint is good, as we have decided it to be, the answer is necessarily bad.

The overruling of the motion for a new trial is assigned as error. It is urged that the evidence is insufficient to support the finding. We have examined the evidence, and, while it is not as satisfactory as we could wish it to be, we think it tends to sustain the finding in all essential points.

It is further insisted, in connection with the ruling upon the motion for a new trial, that the court erred in admitting testimony in proof of the parol agreement relied upon. Our ruling upon the sufficiency of the complaint fully disposes of this question, and we need not further consider it.

¹² The court, of its own motion, called the appellee to the stand to testify as a witness. The appellant urges that this was an abuse of its discretion, under section 510 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 502), which provides that the court may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion shall be reviewable on appeal.

Under former statutes, the action of the court in exercising the discretion of allowing a party to testify in such cases was not subject to review by the appellate tribunal: *Perrill v. Nichols*, 89 Ind. 446.

But the present statute expressly provides that the exercise of the discretion is reviewable, and it therefore becomes the duty of the court, on appeal, to examine into the circumstances under which the discretion was exercised. Every case where the discretion has been exercised must necessarily be determined upon its own merits, and no general rule which would be applicable in all cases can be laid down: *Willitts v. Schuyler*, 3 Ind. App. 118; *Forgerson v. Smith*, 104 Ind. 246.

In the case before us, two competent witnesses, daughters of the appellee, had testified before the court called the appellee to the stand. These witnesses had, as the court determined, made out a *prima facie* case for the appellee. Under these circumstances, we do not think it was an abuse of the discretion vested in the court to permit the appellee, who would otherwise have been incompetent under sections 506 and 507 of the Revised Statutes of 1894 (Rev. Stats. 1881, secs. 498, 499), to give her version of the transaction.

Other questions of minor importance are presented, but we think we have covered the entire ground upon which the several alleged errors are based, and it will ¹³ not subserve any good purpose to prolong this opinion by noticing such questions in detail.

While we must freely admit that there are features about this claim that do not impress it with that high character of merit that might be desired, we must adhere to the rule of indulging every presumption in favor of the correctness of the judgment until it be overcome by an affirmative showing of some prejudicial error.

The judgment is affirmed.

TRUSTS—PAROL EVIDENCE TO ESTABLISH.—Under the statute of frauds the existence of a direct or express trust in lands cannot be established by parol, but when there is some written evidence of the existence of a trust, parol evidence is admissible to show the truth and nature of the transaction: *Johnson v Calnan*, 19 Colo. 168; 41 Am. St. Rep. 224, and note.

WITNESSES—COMPETENCY—QUESTION FOR COURT.—The competency of a person offered as a witness to testify must be decided by the trial court then and there, and its ruling is not subject to review nor disturbance on appeal unless a clear abuse of discretion is shown: *Dickson v. Waldron*, 135 Ind. 507; 41 Am. St. Rep. 440.

JUDGMENTS BY DEFAULT.—THE CONCLUSIVENESS of judgments by default is discussed in the extended note to *Dunlap v. Steere*, 27 Am. St. Rep. 148.

TRUSTS—STATUTE OF LIMITATIONS.—As long as there is a continuing and subsisting equitable trust acknowledged or acted upon by the parties, the statute of limitations does not apply, but if the trustee denies the right of his cestui que trust, and the possession becomes adverse, lapse of time from that period may constitute a bar in equity: *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, and note. The statute of limitations does not begin to run in cases of express trusts until a repudiation of the trust: *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474, and note. To the same effect see *Maxwell v. Barringer*, 110 N. C. 76; 28 Am. St. Rep. 668, and note.

McFARLAND v. SWIHART.

[11 INDIANA APPEALS, 175.]

PARTITION FENCES—LIABILITY FOR NEGLIGENCE IN CONSTRUCTION.—If an owner constructs and maintains a partition barbed-wire fence in so negligent a manner that the stock of another lawfully pasturing on adjoining premises become entangled in the wires and injured, without the fault of their owner, the party so constructing the fence is liable in damages for such injury.

PARTITION FENCES—BARB WIRE—NEGLIGENCE IN CONSTRUCTION.—Although erecting a barbed-wire partition fence

is not of itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence.

PARTITION FENCES—NEGLIGENCE IN CONSTRUCTION—NOTICE BY INJURED PARTY.—A person who sues for injury to his stock, caused by the improper construction of a partition fence, and who alleges that he is without fault, cannot, as matter of law, be charged with notice of the careless and negligent manner in which the fence was constructed.

A. J. Stakebake, for the appellant.

J. S. Engle, for the appellee.

175 DAVIS, J. The material allegations in appellee's complaint are, that it was the duty of the appellant to construct and maintain one end or half of a certain partition fence between the appellant's land and the land of one Brane, and that the said appellant constructed said fence and maintained the same in such a negligent and careless manner that the same was dangerous, in this, that the posts set in the ground for the support of the wires were too far apart to support the wires properly; that on said posts were strung six barbed wires with sharp barbs about four inches apart on said wires; that said posts were so negligently put in the ground that they were insufficient to keep the wires at a proper tension, and the said wires were not tightened and drawn into proper tension; that the top wire of said fence was **176** four feet and four inches from the ground, and the second wire from the top was eighteen inches from the top wire, and the third from the top was eleven inches below the second wire, at the point where the several wires were fastened to the posts, and that the wires were allowed to sag on account of not being sufficiently taut, and because of the insufficiency of the posts as aforesaid; that the said wires thus armed with the said sharp barbs, so loosely arranged and strung on said posts at such a distance from each other, were a trap and a menace to horses, etc., coming in contact therewith, and were dangerous to horses, etc.; that said barbed wires on said fence sagged down and swung loosely on the posts thereof, and the space between the said barbed wires at the top of said fence, on account of the negligent manner in which the fence was constructed, was from eighteen to twenty-four inches; that horses, etc., coming in contact therewith could easily put their heads through said fence between the barbed wires, and on account of the sagged and loose condition of the barbed wires, horses, cattle, and other stock could easily put their heads over said fence, and such stock were inclined to do so in coming in contact therewith, and would attempt to cross over the same, and in

so crossing would become entangled in the said barbed wires, etc.; that said appellee was the owner of a certain horse, of the value of one hundred dollars, and that he hired pasture for said horse of said Mahlon Brane, and the said horse was turned on said pasture in an adjacent field belonging to said Brane, which was separated by said fence so negligently constructed and maintained by appellant, and that said horse, while so pasturing in said field, came in contact with said barbed-wire fence, and undertook to cross over the same, and, in so attempting to cross, became entangled in said barbed wires and was cut, lacerated, and wounded ¹⁷⁷ thereby and had his throat cut by and on said barbed wires in said entanglement, and was then and there and thereby killed, without the fault or negligence of appellee, to his damage, etc.

The court overruled a demurrer to the complaint, and this ruling presents the only question for our consideration.

The complaint is founded on the alleged careless and negligent construction and maintenance of the partition fence against and on which appellee's horse was killed. The grievance is, not that the appellant erected and maintained a barbed-wire fence on the line dividing his land from his neighbor's land, but that such fence was so carelessly and negligently constructed and maintained that it was a breach of duty he owed to said neighbor and all persons who might lawfully use the adjoining land. The complaint does not rest on the theory that the erection of a barbed-wire fence is necessarily a tort, but it is predicated on the fact that the fence in question was so constructed as to be dangerous to horses, etc., depasturing on the adjoining premises. Although erecting a barbed-wire fence is not of itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. In other words, a thing may not be dangerous per se if properly constructed, but it may be dangerous if improperly and negligently constructed. The duty owing by appellant was to anyone who might lawfully depasture or turn stock on the premises adjoining the said fence, and the duty was owing from the appellant to the owner of the horse. It is true the complaint is not a model pleading, but, in our opinion, it is sufficient to withstand the demurrer under the rule enunciated in *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213.

¹⁷⁸ We think the injury done in this case to appellee's horse, as shown by the averments in the complaint, was the natural and probable consequence of the negligent construction and maintenance of the fence by appellant which any prudent man should have foreseen in the exercise of ordinary care.

Counsel for appellant insist that appellee was guilty of contributory negligence because he was bound to know the kind and condition of the fencing that constituted a part of the inclosed field in which his horse was being pastured. There is no rule of law that would charge appellee, in the face of the averment that he was without fault, with notice of the careless and negligent manner in which the fence was constructed and maintained by appellant. If appellee was without fault, he did not have such notice of appellant's negligence as would, as a matter of law, charge him with contributory negligence. If it appeared as a fact that appellee voluntarily turned his horse into this field with knowledge of the defective, negligent, and dangerous condition of the fence, a different question would be presented.

Whether such question would be one of law to be determined by the court or one of fact to be determined by the jury under the circumstances of the particular case, we need not now decide.

Judgment affirmed.

PARTITION FENCE—NEGLIGENCE IN CONSTRUCTION OF. If an owner, while engaged in constructing a barbed-wire partition fence, negligently leaves it in such improper shape that the stock of another lawfully pasturing on adjoining premises become entangled in the wires and injured without the fault or contributory negligence of their owner, the party so constructing the fence is liable in damages for the injury: *Lowe v. Guard*, 11 Ind. 472; post, p. 511, and extended note.

HAYMOND v. BLEDSOE.

[11 INDIANA APPEALS, 202.]

HUSBAND AND WIFE—USE OF WIFE'S SEPARATE ESTATE BY HUSBAND—TRUST.—If a husband, with the consent of his wife, uses a part or all of the principal or the proceeds of her separate estate in his business and for the support of the family, he, or his estate, is presumptively liable to the wife therefor as her trustee, in the absence of agreement between them as to whether the advancement is a loan or a gift.

W. Spangler and J. M. Spangler, for the appellant.

J. C. Nye, for the appellee.

²⁰³ ROSS, J. The judgment appealed from was rendered upon an account filed by the appellee against the estate of John T. Bledsoe.

The facts, as found by the court, are as follows: "That John Bledsoe died intestate some time in 1892: that he left the plaintiff, his widow, surviving, and several children of a former wife

and of the plaintiff surviving him; that William C. Haymond is the administrator of his estate; that the plaintiff and the decedent intermarried about the year 1858; that the plaintiff had been previously married and had children by such first marriage; that upon the settlement of her first husband's estate, and after her marriage with the decedent, and along for several years, she received various sums of money, both from the estates of her deceased husband and father, amounting, in the aggregate, to about six hundred dollars; that upon the receipt of such several sums of money, she allowed the decedent to take and use the same in his business and for support of his family without any understanding as to whether the same was a loan or gift; that at the time of this marriage with the plaintiff the decedent was not in very good circumstances financially, but that up to the time of his death he had accumulated property to the amount of about four thousand dollars, after the payment of the debts of his estate; that the plaintiff and the decedent lived together as husband and wife up to the time of his death, with their children."

Upon these facts the court concluded: "That the decedent received the six hundred dollars as trustee for his wife, the plaintiff, and that the estate of the decedent is liable to her therefor, with interest thereon from March 28, 1893, the date of the filing of the claim."

The errors assigned are: "1. That the court erred in the conclusions of law stated upon the special findings of facts; ²⁰⁴ 2. That the court erred in overruling the appellant's motion for a new trial." There is no conflict in the evidence, and its tendency is to establish all of the facts found by the court.

Counsel for the appellant insist that when appellee turned the money over to her husband it was in the nature of a gift, and for that reason no right of action exists in her favor for its recovery.

In support of this contention, counsel cite us to Perry on Trusts, third edition, section 666, where the author says: "If the husband uses the wife's property in his business for the support of his family, with her knowledge and consent, a gift may be inferred."

It will be noticed that the learned author does not say that when the husband uses the wife's property in his business for the support of his family, with her consent, a gift is inferred, but only that it may or may not be inferred, according to the attending facts and circumstances.

In *Bristor v. Bristor*, 93 Ind. 281, the court says: "It has long been the rule of the courts that where the husband, with the

knowledge and consent of the wife, applied the income arising from her separate estate to the benefit of the family, no charge could accrue against him, in the absence of an understanding or agreement on his part to repay her."

As an abstract proposition of law, the above quotation from Perry on Trusts may be true, but it is surely subject to limitation in its application. Much depends upon the facts and circumstances of each particular case; hence, it is almost impossible to announce a rule applicable to every case. The trend of the more recent cases is, that on account of the peculiar relation existing between husband and wife, the inference which naturally arises from a transfer of her separate property to him is to create a ²⁰⁵ trust, and, if a gift was intended, the onus is upon the party seeking to uphold it.

For, as Mitchell, J., in *Armacost v. Lindley*, 116 Ind. 295, says: "Transactions between husband and wife are presumably influenced by the peculiar relation which exists between them, and, where a husband obtains possession of the separate money or property of his wife, it must appear from all the circumstances that the wife intended to make a gift of it to him."

While it is true, as stated in *Bristol v. Bristol*, 93 Ind. 281, that when a husband receives and applies the income arising from his wife's estate to the support and maintenance of their family, with her knowledge and consent, she cannot recover the same back from him, in the absence of an understanding or agreement on his part to repay her, yet the rule is different when he receives and uses the principal of her separate estate. This distinction is clearly made in many of our cases: *Parrett v. Palmer*, 8 Ind. App. 356; 52 Am. St. Rep. 479; *Hileman v. Hileman*, 85 Ind. 1; *Denny v. Denny*, 123 Ind. 240.

Following these cases, which we think are decisive of the questions involved in this case, the judgment will have to be affirmed.

Judgment affirmed.

HUSBAND AND WIFE—USE OF WIFE'S SEPARATE ESTATE BY HUSBAND.—If a wife voluntarily delivers her money to her husband, the law presumes that he takes it as trustee for her and not as a gift, even though there is no express promise to repay: *Parrett v. Palmer*, 8 Ind. App. 356; 52 Am. St. Rep. 479. See, also, the notes to *Clark v. Patterson*, 35 Am. St. Rep. 501, and *Driggs, etc. Bank v. Norwood*, 7 Am. St. Rep. 82.

PENCE v. BECKMAN.

[11 INDIANA APPEALS, 263.]

PLEADING AND EVIDENCE—VARIANCE.—Although the complaint in an action avers an express promise, a recovery may be had upon proof of an implied promise.

E. B. Goodykoontz and G. M. Ballard, for the appellant.

J. W. Lovett and S. M. Keltner, for the appellee.

263 LOTZ, J. In this action, the appellee sought to recover a judgment against the appellant for the value of pasturage furnished by the appellee to appellant's livestock. The complaint is in the ordinary form, and alleges that the pasturage was furnished at the special instance and request of the defendant. Trial by jury and verdict in favor of appellee in the sum of one hundred and thirty dollars, on which judgment was pronounced.

The only assignment of error discussed by appellant's counsel is the overruling of the motion for a new trial. It appears from the evidence that the appellant was the owner of a farm consisting of about one hundred and forty acres, all of which he leased to the appellee, except the dwelling-house and garden. The appellant's livestock were permitted to pasture and graze upon said lands, with the knowledge of both appellant and appellee. Nothing was ever said between them as to pay therefor at the time.

If we understand the argument of appellant's counsel, it is contended that there is a fatal variance between the allegations of the complaint and the proof; that the complaint declares upon an express special contract, while the proof establishes an implied contract. It is true that **264** when a complaint declares upon a special contract there can be no recovery upon an implied one. An express contract is one in which the terms are stated in parol or in writing, while an implied contract is a matter of inference or deduction. It creates an obligation akin to duty. A special contract is one of peculiar terms or provisions. An express contract may or may not be special, but a special contract is always express. The common-law rule of pleading was, that a declaration in assumpsit must declare upon an express promise, but a recovery might be had on proof of an implied promise, and this seems to be the rule under the code: *Forester v. Forester*, 10 Ind. App. 680. It is true that the complaint makes use of the words "special instance and request," but these are not words of the contract itself. They merely state a conclusion of the pleader, and not a fact. The complaint may be construed as declaring on an express promise but not on a special promise. As a recovery may be had upon

the proof of an implied promise, although the complaint aver an express one, there was no variance, and the motion was correctly overruled.

Judgment affirmed.

PLEADING—VARIANCE.—Although a complaint sets out an express agreement it will be sustained by evidence of an implied one: *Smith v. Lippincott*, 49 Barb. 398. The variance between the pleadings and the proofs is immaterial, where suit is brought by a creditor of a corporation against the defendants as subscribers to the capital stock to compel the payment of their unpaid subscriptions, but the agreement established is an implied rather than an express agreement: *Thompson v. Reno Sav. Bank*, 19 Nev. 242; 3 Am. St. Rep. 883. Where the complaint avers an express warranty, which is not proven, but the facts put in evidence without objection show an implied warranty to the same effect, it seems the variance should be disregarded: *Griffert v. West*, 33 Wis. 617. A party in an action on a special contract, who fails to prove his contract as laid, but proves a different special contract, cannot recover on either contract, nor can he recover on the common counts when there is a special contract in existence: *Fowler v. Austin*, 1 How. 156; 26 Am. Dec. 701. An allegation of facts raising an implied contract is not supported by proof of an express contract: *Lines v. Lines*, 54 Iowa, 600.

CONTINENTAL INSURANCE COMPANY v. CHEW.

[11 INDIANA APPEALS, 330.]

INSURANCE—FAILURE TO PAY PREMIUM—FORFEITURE.—A provision in a policy of insurance that the company shall not be liable for any loss occurring while any part of the premium is overdue and unpaid is valid, and is a good defense to an action to recover for a loss happening during the time when such premium is thus overdue and unpaid.

INSURANCE—FAILURE TO PAY PREMIUM—FORFEITURE—WAIVER.—If, under a policy of insurance providing that the company shall not be liable for any loss occurring while any part of the premium is overdue and unpaid, the company, with knowledge of a loss, accepts a premium overdue, it thereby waives the forfeiture and restores the policy to its full force, not only as to the future, but also from the beginning.

INSURANCE—ERRONEOUS STATEMENTS IN APPLICATION—INSURER, WHEN BOUND BY.—If an insured, who cannot write, makes true answers to an insurance agent who writes the application and has full knowledge of the facts, but who, through misconception of the force and purport of questions, writes incorrect answers without the actual knowledge of the insured, the insurer is bound thereby.

INSURANCE—WAIVER OF PROOF OF LOSS.—A denial of liability by the general agent of an insurance company when notified of a loss constitutes a waiver, and obviates the necessity of furnishing proofs of loss.

INSURANCE—WHEN SEPARATE.—If a policy provides for a certain amount of insurance on a house, and a distinct amount on its contents, the insured cannot, in case of loss, recover more for the contents than the amount named in the policy.

EVIDENCE—CONTENTS OF LOST LETTER.—The receiver of a letter may testify to its contents after proper preliminary proof that it has been lost, without notice to the writer to produce it.

J. Brown, W. A. Brown, and T. Bates, for the appellant.

L. P. Mitchell and M. E. Forkner, for the appellee.

330 GAVIN, J. The appellee recovered judgment against appellant upon a fire insurance policy. The premium was fifteen dollars, payable three dollars in cash and three dollars annually in advance, a note for the deferred payments being given. The policy provides that the company shall not be liable for any loss occurring while any part of the premium is overdue and unpaid. The note contains a provision of the same import.

331 It is well settled that provisions of this kind are valid and enforceable, and that under them the failure to pay the premium when due is a sufficient defense to an action upon the policy to recover for a loss happening during the time when such premium is thus overdue and unpaid: *American Ins. Co. v. Henley*, 60 Ind. 515; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Continental Ins. Co. v. Dorman*, 125 Ind. 189.

The establishment of this rule does not, however, by any means foreclose the company from waiving the right which is thus given it, nor is there anything in the decisions of the various cases which we have cited which forbids such waiver.

Although the company has a right to rely upon such default by the insured as a defense, if it, with knowledge of a loss, accepts the premium, it thereby waives the forfeiture and restores the policy to its full force and effect. Such acceptance does not simply revive the policy as to the future, but it thereby restores to it its power and force from the beginning.

Whatever may be the holdings in some jurisdictions, the question cannot be regarded as an open one in Indiana.

It has received quite a full and thorough investigation at the hands of our supreme court, and in an opinion by Elliott, J., it was adjudged that in such cases the insurance company could not take the benefit without assuming the burden, but must, if it accepts the premium, respond to the loss: *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203.

The principle of waiver asserted in this case has been approved by the same court in *Michigan etc. Ins. Co. v. Custer*, 128 Ind. 25, and *Replogle v. American Ins. Co.*, 132 Ind. 360. To the same effect are *Joliffe v. Madison etc. Ins. Co.*, ³³² 39 Wis. 111; 20 Am. Rep. 35; *Smith v. St. Paul etc. Ins. Co.*, 3 Dak. 80; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325; 60 Am. Rep. 24.

In the application, in answer to a question, it was stated that the insured held title by a warranty deed. An answer and the evidence show that this was not strictly true, but that she held title by inheritance from her husband, who had a warranty deed and died intestate, seised of the property, leaving as his heirs his widow and several of their children. It is claimed that this statement of her title was a warranty, the breach of which avoids the policy. A careful examination of the terms of both application and policy leaves it at the most extremely doubtful whether there is any warranty of this fact at all: *Indiana etc. Ins. Co. v. Rundell*, 7 Ind. App. 426; *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85.

Passing this question, however, if the statement be regarded as a warranty, the reply and the evidence show that the facts concerning the title were well known to the agent who took the application, and that true answers were made to the questions by the appellee, who could not write, but that the agent who wrote the application, probably through some misconception as to the force and purport of the question, wrote an incorrect answer of which appellee had no actual knowledge. Under such circumstances, the company must bear the results of the fault of its own agent: *Howe v. Provident etc. Soc.*, 7 Ind. App. 586; *Phenix Ins. Co. etc. v. Lorenz*, 7 Ind. App. 266; *Michigan etc. Ins. Co. v. Leon*, 138 Ind. 636; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Steele v. German Ins. Co.*, 93 Mich. 81; *Robison v. Ohio etc. Ins. Co.*, 93 Mich. 533; *Wich v. Equitable etc. Ins. Co.*, 2 Colo. App. 48; *McMurray v. Capital Ins. Co.*, 87 Iowa, 453.

³³³ We find nothing in *Robinson v. Glass*, 94 Ind. 211, which controverts this proposition.

No "proofs" of loss were made, as required by the terms of the policy, but the complaint alleges a waiver by the denial of liability through appellant's general agent when notified of the loss. Such a waiver obviates the necessity of furnishing proofs: *Commercial etc. Assur. Co. v. State*, 113 Ind. 331; *North British etc. Ins. Co. v. Crutchfield*, 108 Ind. 518; *May on Insurance*, sec. 469.

Counsel deny the sufficiency of the proof upon this question. Without stopping to determine the extent of the authority of the local agent, we think it clear, according to his own evidence, that his denial of liability was authorized by those in charge of the general offices to whom he communicated the fact of the loss. By his denial, he only repeated the statement made to him in the letter written him from the general office.

The company has consistently and continually persisted in its denial of the validity of the policy at the time of the loss, from that time to the present, and thereby waived the proofs.

This court cannot weigh the evidence to decide where lies the preponderance, but is only called upon to determine whether or not there is some evidence, either direct or inferential, fairly sustaining every fact essential to the maintenance of the finding or verdict: *Haines v. Porch*, 9 Ind. App. 413; *McDaneld v. McDaneld*, 136 Ind. 603.

Under this rule, we cannot say the finding is unsupported by the evidence.

The policy provides for four hundred and fifty dollars insurance on the house, and one hundred and fifty dollars on the contents. Thus there was not a general or blanket policy of six hundred dollars on both house and contents, but separable contracts for insurance to the amount of four hundred and fifty dollars ³³⁴ on the house, and one hundred and fifty dollars on the personalty: *Nappanee Furniture Co. v. Vernon Ins. Co.*, 10 Ind. App. 319.

There is also in the policy a provision that the company shall not be liable for an amount beyond the value of the interest of the assured in the property insured.

It is conceded by counsel for the appellee that she owned but a one-third interest in the realty, and that consequently she was entitled to recover on account of the building, the value of which was four hundred dollars, only the one-third thereof, or one hundred and thirty-three dollars and thirty-three cents.

The amount of the recovery was four hundred and thirty-three dollars and thirty-four cents. Counsel seek to justify this amount upon the theory that appellee is entitled to the full value of the personal property destroyed, which was shown to be three hundred dollars.

This position, however, cannot be maintained, because she could not in any event recover on account of the loss of the personalty more than the amount of insurance distributed to it in the policy.

There was no error in permitting a witness to testify to the contents of a letter written to him by appellant, the proper preliminary proof as to loss having been made. The letter was not in appellant's possession.

There was, therefore, no necessity for serving a notice upon appellant to produce it under section 486 of the Revised Statutes, 1894 (Rev. Stats. 1881, sec. 478).

Since the amount of the finding cannot be approved, the judg-

ment is affirmed, at the costs of appellee, upon condition that she remits one hundred and fifty dollars of the judgment, as of the date thereof, within fifty days. Otherwise it will be reversed.

INSURANCE—FORFEITURE OF POLICY FOR NONPAYMENT OF PREMIUM is discussed in the extended note to *Lebanon etc. Ins. Co. v. Hoover*, 57 Am. Rep. 514. See, also, the case of *Bradley v. Potomac etc. Ins. Co.*, 32 Md. 108; 3 Am. Rep. 121.

INSURANCE—WAIVER OF CONDITION AS TO PREPAYMENT OF PREMIUMS.—The acceptance of a premium after loss has occurred is a waiver of the right to declare a forfeiture of a policy of insurance and not a mere act of revivor: *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203. Conditions contained in a policy of insurance, intended for the benefit of the company and relating to the payment of premiums may be waived by it: *Nebraska etc. Ins. Co. v. Christensen*, 29 Neb. 572; 26 Am. St. Rep. 407, and note. See, also, the extended note to *Piedmont etc. Ins. Co. v. Young*, 29 Am. Rep. 777, 779.

INSURANCE—WAIVER OF PROOF OF LOSS BY DENIAL OF LIABILITY.—A condition in a policy of insurance that in case of loss the insured must forthwith give written notice thereof to the insurer is waived by the latter when, with full knowledge of the loss, he denies all liability without waiting for such written notice: *Savage v. Phoenix Ins. Co.*, 12 Mont. 458; 33 Am. St. Rep. 591, and note. An insurance company, by refusing to pay a loss and depending on the ground that the policy was not in force at the time of the loss, thereby waives the right to be furnished with any proof of loss as required by the policy: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note. See to the same effect *Faust v. American etc. Ins. Co.*, 91 Wis. 158; 51 Am. St. Rep. 876, and note.

INSURANCE—ERRONEOUS STATEMENTS WRITTEN BY AGENT—ESTOPPEL.—An insurance company is estopped to take advantage of the falsity of an answer in an application for insurance, where the agent of the company, being correctly informed at the time, fills out the false answer without the knowledge of the insured, and where such error in the application occurs through no fault of the insured, but is the result of the agent's negligence: *German Ins. Co. v. Hayden*, 21 Colo. 127; 52 Am. St. Rep. 206. See, also, the notes to *Malhoit v. Metropolitan etc. Ins. Co.*, 47 Am. St. Rep. 344, and *Creed v. Sun Fire Office*, 46 Am. St. Rep. 137.

INSURANCE—DIVISIBILITY OF CONTRACT.—For a discussion of this subject see the extended note to *Gould v. York County etc. Ins. Co.*, 74 Am. Dec. 498, and the notes to *Loomis v. Rockford Ins. Co.*, 20 Am. St. Rep. 101; and *Mitchell v. Mississippi etc. Ins. Co.*, 48 Am. St. Rep. 538.

EVIDENCE AS TO CONTENTS OF LETTER.—Parol evidence of the contents of a letter to prove a contract is inadmissible, unless the letter is produced or its loss or destruction accounted for: *Rumbough v. Southern Imp. Co.*, 112 N. C. 751; 34 Am. St. Rep. 528; *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322, and note. If a writing is shown to be lost, secondary evidence of its contents may be received: *Spears v. Lawrence*, 10 Wash. 368; 45 Am. St. Rep. 789, and note.

LOWE v. GUARD.

[11 INDIANA APPEALS, 472.]

PARTITION FENCES—NEGLIGENCE IN CONSTRUCTION—LIABILITY FOR INJURY TO STOCK.—If an owner, while engaged in constructing a barbed-wire partition fence, negligently leaves it in such improper shape that the stock of another lawfully pasturing on adjoining premises become entangled in the wires and injured without the fault or contributory negligence of their owner, the party so constructing the fence is liable in damages for the injury.

PARTITION FENCES—LIABILITY FOR CONSTRUCTING. The right to build a partition fence carries with it an exemption from liability while maintaining it, provided due care is used in its erection and it is left in a reasonably safe condition when completed.

G. M. Roberts and C. W. Stapp, for the appellant

M. J. Givan and M. S. Givan, for the appellee.

472 ROSS, C. J. This action was brought by the appellant to recover damages for injury to his stock which, he alleged, wandered upon the line dividing his land from that occupied by the appellees, and became entangled in barbed wires then being used by appellees in the construction of a fence on said division line. The complaint is in three paragraphs, to each of which demurrers were filed and sustained, and these rulings of the court are the errors assigned in this court.

The paragraphs are similar in their general allegations, the only material difference being in that they seek to recover for injuries sustained at three separate and distinct times.

The material allegations of the first paragraph of the complaint are in substance as follows: "That on the second day of October, 1892, the defendants (appellees) were in possession of a tract of land adjoining the land owned by plaintiff, in Lawrenceburg township, Dearborn county, Indiana"; that they undertook the erection of a barbed-wire ⁴⁷³ fence on the line dividing their land from plaintiff's, and, "in the process of the erection of said fence, carelessly and negligently strung and laid upon the ground, and on the line of such proposed line of fence, and preparatory to stringing the same on the posts, three or more barbed wires, with sharp and jagged barbs projecting from each of said wires, throughout their entire length, at spaces of six inches, and carelessly and negligently allowed said barbed wire to remain lying on the ground at said point, without any guard or protection to prevent the stock from said adjoining pasture fields from coming in contact therewith, and in said condition said wires were negligently and carelessly temporarily abandoned by defendants," without guards, etc. That plaintiff's stock, including a horse,

was pasturing in his field adjoining the defendant's land, and between which the fence was being erected; that the defendants knew plaintiff was so pasturing his stock, and that plaintiff had no knowledge of the defendants building said fence, but that, without fault on his part, his said horse wandered over to and became entangled in the barbed wires so placed on the ground by the defendants, whereby its legs were cut, etc., to plaintiff's damage, etc.

It is very earnestly insisted by the appellee that neither paragraph of the complaint states a cause of action; that the facts alleged affirmatively show that the plaintiff was guilty of contributory negligence in permitting his stock to wander over to and become entangled in the wires. It is true that under the common law the owner of the stock is bound to keep them within his own inclosure, in other words, to keep them on his own premises, and if he suffers them to escape and go upon the lands of another, he must answer in damages: *Pittsburgh etc. Ry. Co. v. Stuart*, 71 Ind. 500, and cases cited. The common law is still in force in this ⁴⁷⁴ state, except in so far as it is changed by section 6564 et seq. of the Revised Statutes of 1894, which makes special provision for the erection and maintenance of partition fences. Under these provisions it is the duty of the adjoining landowners jointly to build and maintain partition fences. They may, however, by special agreement divide and set apart to each the portion which each is to build and maintain. When thus partitioned, each is answerable for the condition of that part set off to him. And provision is made that when one party fails to maintain his part of such fence, the other party may do so for him and recover therefor.

The right of the appellees to build a fence on the dividing line is not questioned, hence that right carried with it an exemption from liability while erecting it, provided they used due care in its erection and left it in a reasonably safe condition when completed. A lawful act may be done in such a negligent manner that if injury results an action will lie. On the contrary, the doing of an unlawful act does not always create a liability.

In this case the building of the fence was lawful, but the appellees had no right to be negligent in the manner of its construction or to leave it in an unsafe condition when completed. If, by reason of their negligence, appellant's stock was injured without fault on his part contributing thereto, they must answer therefor.

A complaint very similar to that under consideration was held

good in the case of *McFarland v. Swihart*, 11 Ind. App. 175, ante, p. 499. The opinion in that case is fully sustained by *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213.

While we may not approve all that is said by the court in the case of *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213, it stands as the law in this state until overruled by the supreme court.

Following these authorities, we must hold each paragraph ⁴⁷⁵ of the complaint in the case under consideration, to be sufficient to withstand a demurrer for want of facts.

Judgment reversed, with instruction to the court below to overrule the demurrers to each paragraph of the complaint.

Partition Fences—Liability for Injuries Arising from Defects in.

Prior to the use of barbed wire for fencing purposes, but few decisions can be found fixing the liability of an owner for his neglect in constructing or keeping in repair a partition, division, or other fence built by him, or which he is required to maintain. In an early case (*Walker v. Watrous*, 8 Ala. 493; 42 Am. Dec. 646), it was decided that an adjoining proprietor could not maintain an action against his immediate neighbor for an injury caused by an insufficient division fence. This adjudication was made under a statute making partition fences joint property, equally belonging to the adjoining proprietors, and devolving upon each the duty of keeping them in good repair. The court said: "It results necessarily, that neither can maintain an action against the other, for an injury caused by an insufficient fence, because it is his own fence, which it is his duty to keep in repair, and which, if either will not aid in keeping up, the other may repair at his expense." In *Pool v. Alger*, 11 Gray, 489, 71 Am. Dec. 726, the court decided that a landowner, who neglected to repair a division fence was not liable to an action by his adjoining neighbor for injuries occasioned by a stranger's cattle unlawfully at large in the highway, and which through such neglect broke into and upon the neighbor's land. In this case the court said: "If considered as an action for damages occasioned by the defendant's neglecting to keep in repair a division fence, between the close of the plaintiff and himself, the plaintiff must also fail to maintain his action, as the defendant was not bound to maintain and keep in repair such division fence, except against cattle rightfully on his land or the land of the plaintiff. The cattle that committed the alleged trespass were unlawfully at large in the highway. Against such cattle the defendant was not bound to keep and maintain a fence. It constituted no defense to an action by the plaintiff against the owner of the cattle that the division fence between plaintiff and defendant was not kept in proper repair, and the proper remedy of the plaintiff was to recur to the owner of the cattle for any damage sustained by their entering upon his land." The court then said, that, as between the adjoining owners, if the cattle of either of them had entered upon the land of the other by reason of neglect to maintain and keep in repair his portion of the partition fence, the party so guilty of neglect

would be liable for the injury sustained thereby: *Pool v. Alger*, 11 Gray, 489; 71 Am. Dec. 726. In *Clark v. Brown*, 18 Wend. 212, it was held that an owner who has neglected to keep his proportion of a division fence in repair, is liable to an adjoining owner for injury to, and death of, the cattle of the latter, caused by their eating unripe corn in the field of such negligent party. If an owner is under legal obligation to keep up a legal division fence, and he neglects to do so, he is liable if one of his animals goes upon the land of an adjoining proprietor through such defective fence, and while there injures an animal belonging to such adjoining owner: *Tupper v. Clark*, 43 Vt. 200. In *Gooch v. Bowyer*, 62 Mo. App. 206, the facts were, that defendant, in building a partition fence between his and plaintiff's land, placed a barbed-wire on plaintiff's side of the fence about twenty inches from the ground, on which plaintiff's horse was injured and subsequently died, and it was held that defendant was negligent in so placing the wire and liable for the injury, and that plaintiff was not guilty of contributory negligence in turning the horse into the field, although he knew of the wire, as he could not be deprived of the use of his premises by defendant's negligence. The fact that a person erects a barb-wire fence on his land along a line of highway, does not, of itself, render him liable to one who thereby sustains an injury, but the rule is otherwise if the fence is constructed and maintained in such manner as to make the person erecting and maintaining it guilty of negligence, for one who negligently constructs and knowingly maintains a barbed-wire fence in a dangerous condition is liable for an injury thereby sustained by domestic animals lawfully on adjoining land, and which are attracted within the inclosure by the presence of other animals and growing pasture: *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213. Though the owner of land is not liable, from the mere act of constructing a barbed-wire fence upon his own land along a line of public highway, for damages sustained by the domestic animals of others, yet he is bound to exercise reasonable care to see that the fence does not become a trap for such animals of the natural propensities of which he is bound to take notice, and if he constructs or maintains such fence in a negligent manner, to the injury of such animals, he is liable therefor, and cannot defend on the ground that the fence was constructed entirely upon his own land, nor on the ground that it was used for a lawful purpose: *Loveland v. Gardner*, 79 Cal. 317. This rule was maintained in *Brown v. Cooper*, 10 Tex. Civ. App. 513, where defendant had placed around his theretofore uninclosed land, a barbed-wire fence, consisting of two and three strands of wire, with posts twenty feet apart, and a horse of the plaintiff's while attempting at night to follow an accustomed stock trail across the land, was injured by the fence. In the late case of *Durgin v. Kennett*, decided by the supreme court of New Hampshire during the year 1894, and not yet officially reported, it was held that one who constructs or maintains a barbed-wire division fence, dangerous to domestic animals, is liable for injuries to such animals of an adjoining owner from coming in contact with, and being maimed by, such fence. In *Bullard v. Mulligan*, 69 Iowa, 416, the parties owned adjoining farms, and the plaintiff's horse entered upon defendant's premises through

a portion of the division fence which the plaintiff was bound to maintain, but which he had failed to maintain as a lawful fence. The defendant, in attempting to drive the animal from his premises, caused him to become entangled in the barbed-wire of which the fence was composed, whereby he received injuries from which he died. The plaintiff brought an action to recover the value of the horse, which he alleged was killed by the negligence of the defendant. It was held that the negligence of the plaintiff in failing to maintain the fence was immaterial, and, in the absence of any other negligence on his part, an instruction that, before he could recover, he must prove that he was not guilty of any negligence which contributed to the injury was erroneous. The subject of partition fences, including the mutual liabilities of adjoining owners for the trespass of domestic animals, arising from defects in, or want of such fences is extensively and thoroughly treated in notes to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 248-273, and *Myers v. Dodd*, 68 Am. Dec. 626-638.

WESTERN UNION TELEGRAPH COMPANY v. MOORE.

[12 INDIANA APPEALS, 136.]

TELEGRAPH COMPANIES—LIABILITY FOR DELAY.—It is as much the duty of a telegraph company to use diligence in delivering messages without unreasonable delay as in transmitting them, and it is generally liable in special damages for such delay or for the nondelivery of a message.

TELEGRAPH COMPANIES.—PREPAYMENT OF SPECIAL DELIVERY CHARGES before transmission of a telegram, even when properly chargeable, is not under all circumstances prerequisite to the duty to deliver in a city or town, as this duty ordinarily attaches when the message is received and its transmission is undertaken.

TELEGRAPH COMPANIES.—PREPAYMENT OF SPECIAL DELIVERY CHARGES.—A regulation of a telegraph company requiring the payment of special delivery charges before transmission for a telegram to be delivered beyond free delivery limits, does not excuse delay in delivery or nondelivery of the telegram, unless the sender knows or is informed that the residence of the sendee is beyond free delivery limits and of the amount of the special delivery charge.

TELEGRAPH COMPANIES HAVE THE RIGHT TO ESTABLISH PROPER RULES AND REGULATIONS and to insert in their contracts for service proper conditions and stipulations, but they must be reasonable and cannot be permitted to stand if it is sought thereby to evade some legal obligation or limit a common-law or statutory right.

TELEGRAPH COMPANIES—PRINTED CONTRACTS—CONSTRUCTION.—Rules and regulations, conditions, and limitations, contained in printed contracts prepared by telegraph companies, must be construed most strongly against them.

TELEGRAPH COMPANIES — SPECIAL DELIVERY CHARGES—PREPAYMENT OR GUARANTY.—Under a condition in a telegraph company's printed blank requiring the payment of special delivery charges for delivery of a telegram beyond free deliv-

ery limits, payment of such charges in advance, or a guaranty therefor is not required, the fair inference being that the amount of the charge is not ascertainable until the service is performed.

J. E. Lamb and J. T. Beasley, for the appellant.

J. C. Blacklidge, C. C. Shirley, and B. C. Moon, for the appellee.

¹³⁷ GAVIN, J. The appellee sued to recover special damages suffered by reason of appellant's failure to deliver to her with reasonable diligence a message sent to her from Delphi, Indiana, announcing the death of her child.

The appellant answered by the general denial, and also specially setting up a provision in the telegraph blank on which the message was sent, to the effect that messages would "be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery." It was also averred that appellant had then, and for a long time prior thereto, a general rule in force as follows:

"Rule 50. Messages will be delivered free within a radius of one-half mile from the office in any city or town of less than five thousand ¹³⁸ inhabitants, and within a radius of one mile from the office in any city or town of five thousand or more inhabitants. Beyond these limits only the actual cost of the delivery service will be collected. The manager will see, however, that such cost is as reasonable as possible."

It is also alleged, in connection with many other averments, that appellee resided outside the free delivery limits and nothing was paid or guaranteed for delivery charge.

The cause was tried by the court. After a special finding and conclusions of law thereon, judgment was rendered in appellee's favor. The correctness of the conclusions of law is assailed in this court.

The case hinges upon appellant's duty to deliver the message outside its free delivery limits. From the finding we learn that appellee resided two squares beyond the one-mile limit in Kokomo, a city of more than five thousand inhabitants; that this fact was not known to either the appellant or the sender of the message at the time of its delivery to appellant, who charged and received for its transmission twenty-five cents, the usual charge for service between the two points. The court found the answer true as to the existence of the clause in the blank and rule 50, as set out above, but that the sender had no actual knowledge of either. After receiving the message at Kokomo appellant's agent there

learned where appellee lived and sent a service message to Delphi requiring a guaranty of the delivery charges. Of this demand the sender was not notified, although the local agent sought to find him, but did not do so, and did not go or send to his house, where he then was, which was a short distance more than half a mile from the office, that being the free delivery distance there. The message was not delivered until after the funeral of the child, and then ¹³⁹ only when called for by appellee, who had accidentally learned it was there.

Section 5513 of the Revised Statutes of 1894, being section 4177 of the Revised Statutes of 1881, reads thus: "Telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering dispatches."

The following section, 5514, is: "3. Such companies shall deliver all dispatches, by a messenger, to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same; provided, such persons or agents reside within one mile of the telegraphic station or within the city or town where such station is."

Counsel for the appellee expressly concede that the appellant had the right to increase its charges according to the distance the sendee of the message lived from the receiving station. We, therefore, consider this case upon that theory without stopping to determine its correctness under the statute.

The appellant contends that its duty to deliver the message in question arises from said section 5514, and is contingent upon the actual payment of its extra delivery charge, according to the terms of its rule 50; that without payment there is no duty; that the payment, therefore, must precede the duty to deliver, and since there was no payment there was no default.

It is well understood that men use the more expensive telegraphic service because the urgency of the matter on hand is such that haste is demanded, and the usual course of the mails will not answer the purpose.

Delivery to the person intended is essential to the accomplishment of this purpose. Mere transmission from one station to the other would avail nothing. It has consequently been held that it is as much the duty of ¹⁴⁰ such companies to use diligence in delivering without unreasonable delay as in transmitting: *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Western Union Tel. Co. v. Gougar*, 84

Ind. 176; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

It is also adjudged that the sendee of the message may maintain an action for special damages on the nondelivery of the message: *Western Union Tel. Co. v. Fenton*, 51 Ind. 1; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 48 Am. Rep. 692; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364.

To sustain its position that there was no duty to deliver without actual payment, appellant cites *Western Union Tel. Co. v. Mossler*, 95 Ind. 29, where it was held that, in order to recover the statutory penalty provided for by section 4176 of the Revised Statutes of 1881, actual payment or tender was necessary.

It might be sufficient to say that in this case the recovery of a statutory penalty was sought and a much stricter rule of construction applies where the right to a penalty is asserted than where compensation alone is desired. In the opinion itself the decision is expressly limited to actions for a penalty.

The distinction between suits to recover the penalty and those for damages actually suffered is recognized in *Western Union Tel. Co. v. Meek*, 49 Ind. 53, where, as here, it was contended that there was no liability because there was no payment, "but," the court says, "the complaint and evidence show us that the appellant was a common carrier of messages; and was engaged by the appellee's agent to transmit this particular message. The appellant thereby became entitled to her hire at the usual rates, and the appellee became liable therefor. We think that where the suit is for damages under the statute, ¹⁴¹ as in this case, and not for the fixed penalty, such a mutual obligation is sufficient to maintain the case. When the appellant undertook to transmit the message, her obligation to perform her duty and her right to receive her hire attached."

In *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, even the penalty was held recoverable without either payment or tender, the tender having been waived.

To what extent, if any, the cases are in conflict as to the recovery of the penalty we are not called upon to determine.

Langley v. Western Union Tel. Co., 88 Ga. 777, is like *Western Union Tel. Co. v. Mossler*, 95 Ind. 29, which it follows, for the enforcement of the penalty merely.

That the literal compliance with the terms of the statute contended for by appellant is not absolutely essential to a recovery

of damages is also shown by *Reese v. Western Union Tel. Co.*, 123 Ind. 294, where the second paragraph of complaint was held good although there was no payment, there being merely a guaranty, for which there is no provision in the statute.

Our conclusion, therefore, is, that prepayment (before transmission) of a special delivery charge, even where properly chargeable, is not, under all circumstances, a prerequisite to the duty to deliver the message in a city or town, the duty ordinarily attaching when the company receives the message and undertakes its transmission.

If a special delivery charge be proper under such circumstances, and we are deciding this case upon that assumption, it may well be that the company would have a right to require its payment in advance by the sender, when the fact of the residence beyond free delivery limits was known to him and he was informed of the amount of the special charge.

A rule, however, which would require such prepayment ¹⁴² of the sender, although ignorant that such a charge would be made, or when the amount was undetermined, would, in our opinion, be unreasonable and oppressive in such instances, and should not be enforced.

We are aware that in *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, it is declared that the sender is bound to know whether the sendee lives within the free delivery limits, and must himself provide, beforehand, for delivery if he does not. We do not, however, concur in the reasoning or conclusion of this case upon this proposition. Many men have occasion to communicate with others in cities and towns where they are totally ignorant of the distances between the company's receiving station and the addressee's residence. Even if they know the street and number, they may still be wanting in a knowledge of the location with reference to the station.

Such a regulation as we are now considering would, as it seems to us, be harsh, inequitable, and unnecessary. When the patron pays to the company the amount which he believes, in good faith, covers its entire charge for the service, and the company receives it and the message, he has a right to expect that the company will carry the message to the person addressed, if within the statutory delivery limits, and present it to him for delivery. If there be then any additional sum due, the company may require its payment before it surrenders the message to the sendee, if it prefers to do so rather than rely solely upon the sender for its payment.

The company will thus be furnished ample protection, and the expectations and purposes of the sender of the message will not be disappointed.

This course seems to us to afford a much fairer and more equitable solution of the problem as to what is the duty of the company than to hold that it may stop the message halfway upon its course, and thus really render ¹⁴³ to the sender no service, after receiving from him what both thought to be the full price therefor. We apprehend that, if such a course were followed, there would be few instances where the sendee would refuse to receive the message, and pay the delivery charge, if proper.

If he did, a notification to the sender would, in the most of those few instances, bring the money from him. If, however, the company might occasionally lose a delivery charge, the loss to it would be trifling and inconsiderable when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon their delivery of the message.

The company, of course, had a right to establish proper rules and regulations for the transaction of its business, and to insert in its contracts for service proper conditions and stipulations, yet, by reason of the quasi public character of such corporations, and the public duty owing from them, these rules and limitations and conditions must be reasonable, nor will they be permitted to stand if the company thereby seeks to absolve itself from some legal obligation, or limit a common-law or statutory right: *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Jones*, 95 Ind. 228; 48 Am. Rep. 713; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Thompson on Election*, sec. 184.

We have gone thus far upon the assumption that counsel for the appellant were correct in construing the free delivery clause in the message blank, and rule 50, which we have already set out, to require payment of the delivery charge by the sender in advance of transmission over the wires.

It has long been settled that, in considering insurance policies, they shall be construed most strongly against the company, because they are prepared by it after full and careful thought, while the other party has but little ¹⁴⁴ opportunity to weigh the meaning of the words used: *Pennsylvania etc. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Northwestern etc. Ins. Co. v. Hazelett*, 105 Ind. 212; 55 Am. Rep. 192.

The same rule is applicable to the construction of the rules and

printed contract clauses prepared by telegraph companies, and they are not to be extended against the companies' patrons beyond the letter: *Western Union Tel. Co. v. Yopst*, 118 Ind. 248.

Counsel insist that, under the contract and rule, either payment in advance or a satisfactory guaranty was required. A careful reading of both the contract and rule fails to disclose any such requirement. So far as we are able to discover, it is not so denominated in the bond. The contract says that for delivery beyond the free delivery limits (which are not specified), "a special charge will be made to cover such delivery."

There is nothing here to indicate that security will be demanded therefor or payment in advance. The fair inference rather is, that the amount of the charge is not ascertainable until the service is performed, it being a special charge dependent upon the labor required.

So likewise in the rule, even if we hold the sender chargeable with notice thereof, after stating the free delivery limit it is said: "Beyond these limits only the actual cost of the delivery service will be collected. The manager will see, however, that such cost is as reasonable as possible." Here is nothing about payment in advance or security or deposit or guaranty.

A very natural construction at least (and as it seems to us the one most natural) is, that the company would deliver the message as cheaply as possible and then collect the actual expense from the sendee or the sender, the latter being always liable therefor because he had required the rendition of the service.

¹⁴⁵ With these views of the law appellant was entitled to recover upon no theory tenable under the facts.

Judgment affirmed.

TELEGRAPH COMPANIES—LIABILITY FOR DELAY IN DELIVERY OF MESSAGE.—A telegraph company is liable for damage resulting naturally and in the usual course of business from its failure to deliver a message promptly: *Note to Gulf etc. Ry. Co. v. Loonie*, 27 Am. St. Rep. 897. It is the duty of a telegraph company to deliver messages promptly, and it is liable for any unreasonable delay in doing so: *Extended note to Birney v. New York etc. Tel. Co.*, 81 Am. Dec. 616. The damages for which a telegraph company is liable upon failure to transmit and deliver with proper diligence a message concerning sickness or death are such as fairly and reasonably may be considered as arising naturally and according to the usual course of things from a breach of contract or such as reasonably may be supposed to have been in the contemplation of the parties as a probable result of such breach: *Western Union Tel. Co. v. Linn*, 87 Tex. 7; 47 Am. St. Rep. 58, and note. See, also, the extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 782, and note.

TELEGRAPH COMPANIES—FREE DELIVERY LIMITS.—Where a telegraph company has established free delivery limits, notice of which is given on its blanks, and a message is handed in for transmission without explanation, the presumption is, that the sendee lives within the free delivery limits and the sender takes the risk of delivery, unless he arranges for delivery at a greater distance: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148.

A TELEGRAPH COMPANY MAY MAKE REASONABLE REGULATIONS for the conduct of its business, and its customers are bound by them after they had notice of their existence: *Western Union Tel. Co. v. Neel*, 86 Tex. 368; 40 Am. St. Rep. 847, and note. See, also, on this subject the extended note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 465.

VALPARAISO v. MOFFITT.

[12 INDIANA APPEALS, 250.]

DAMAGES—TORT FEASORS—SATISFACTION OF LIABILITY.—A person injured by others acting severally may obtain several judgments against such persons in different amounts, but the payment of one judgment operates as a satisfaction of all.

TORT FEASORS—JOINT LIABILITY.—Concert of action and common intent and purpose are generally necessary to make two or more persons joint tort feasors and jointly liable, and if several distinct acts of several persons have contributed to a single injury, but without concert of action or common intent, there is generally no joint liability.

TORT FEASORS—SEVERAL LIABILITY.—If there is no concert of action between tort feasors, and their acts are separated as to time and place, but united in their consequences, the fact that it may be difficult to apportion the damages to each act or wrongdoer furnishes no ground to make one wrongdoer liable for all the damages.

TORT FEASORS—SEVERAL AND JOINT LIABILITY.—Although there is no concert of action or unity of purpose between tort feasors, yet if their acts are concurrent as to time and place and unite in setting into operation a single destructive and dangerous force which produces an injury, they are severally and jointly liable.

TORT FEASORS—NUISANCE—JOINT AND SEVERAL LIABILITY.—If the acts of tort feasors are separate and distinct as to time and place, but culminate in producing a public nuisance, which injures the person or property of another, they are jointly and severally liable.

NUISANCE—MUNICIPAL CORPORATIONS are liable for erecting and maintaining a nuisance, the same as natural persons.

NUISANCE—JOINT AND SEVERAL LIABILITY.—All persons, whether natural or artificial, or both together, who create and maintain a public nuisance are jointly and severally liable for all damages resulting therefrom, although they are not tort feasors and a release given by one of them does not release all unless it is in full satisfaction of all the injury sustained by reason of the nuisance.

NUISANCE—CONTINUING LIABILITY.—Every continuance of a nuisance makes a new one creating a new liability, and, if the nuisance is continued one recovery does not bar a subsequent action.

N. L. Agnew and D. E. Kelly, for the appellant.

N. J. Bozarth, for the appellees.

251 LOTZ, J. The appellees, plaintiffs in the court below, averred in their complaint that they were the owners of a certain tract or parcel of real estate, containing about eight and one-half acres, and situate within the corporate limits of the city of Valparaiso; that there were situated on said tract two dwelling-houses, one of which was occupied by the plaintiffs as a residence, and the other used as a tenant house and by them let for hire; that said lands were also used for garden and pasture purposes; that there was a natural watercourse, known as Crosby's Run, passing through and over said lands, the waters of which, previous to the grievances complained of, came from natural springs and was pure and wholesome, and suitable for domestic purposes; that said stream, in its natural condition and at an ordinary stage of the water, did not exceed from two to four feet in width; that about five years prior to the commencement of this action, the defendant, the city of Valparaiso, constructed a system of sewers and underground pipes for the sewerage and drainage of said city; that said pipes and sewers were so constructed that they flowed or emptied their contents into Crosby's Run above plaintiff's land; that the filth, waste, and refuse matter emptied by the sewers into Crosby's Run poisoned and polluted the waters thereof, and rendered them unfit for domestic use; that the surface waters were collected into the said pipes and drains and emptied into Crosby's Run; that in times of great rainfall the waters of that stream overflowed its banks and spread over and upon plaintiffs' lands and caused cesspools of stagnant water and deposited the filth and noxious matter from said sewers thereon; that noxious and unhealthy odors arise from the waters of said stream and from the filth and waste matter, rendering plaintiffs' property unhealthy and depreciating both its market and rental value.

252 The defendant filed an answer in six paragraphs, the first being a general denial. Demurrers were sustained to the second and third and overruled as to the fourth, fifth, and sixth. The plaintiffs replied in two paragraphs. A demurrer was overruled as to the second. The cause was tried by a jury, which returned a general verdict for the plaintiffs.

The errors assigned are the action of the trial court in sustaining the demurrers to the second and third paragraphs of answer and in overruling the demurrer to the second paragraph of the reply, and in overruling a motion for a new trial.

The second and third paragraphs of the answer are the same, except one is pleaded as a full defense and the other as a partial defense. These answers state, in substance, that one John W.

Stratton owned and operated gasworks in the city of Valparaiso; that the waste, noxious, and refuse matter from said gasworks flowed through a sewer and emptied into Crosby's Run above plaintiff's land, and that a part of the pollution and damages complained of were caused thereby; that the sewer through which the refuse matter from said gasworks flowed had been maintained and operated by the city and Stratton for more than three years; that in 1892 the plaintiffs in this action brought a suit against Stratton to recover damages for the pollution of Crosby's Run caused by the sewer from the gasworks, being the same wrongs complained of in this action; that while said suit was pending, it was compromised and settled by an agreement entered of record in which it was stipulated that Stratton should pay the plaintiffs the sum of sixty-five dollars in full satisfaction of all damages caused by said sewer up to the first day of July, 1892, and that Stratton was to have the privilege of emptying the contents of said sewer in said stream until that date; that said suit ²⁵³ was accordingly settled and dismissed and the money paid. The questions arising on the sufficiency of these answers are the main points presented for our consideration in this appeal. The appellant contends that, under the facts stated in these answers, it and Stratton were joint tort feorsors, and that the release of one operated as a release of the other.

Primarily, every person is liable for all the injury caused by him. If he acts separately, he is separately liable for all the injury. If he acts jointly with others, he is both jointly and severally liable for all the injury. These are the general rules, to which there are exceptions. The rule is also well settled that an injured party can have but one satisfaction for the same injury. To this rule there are no exceptions. He may have several judgments against different persons and in different amounts, but the payment of one operates as a satisfaction of all: *Westfield Gas etc. Co. v. Abernathy*, 8 Ind. App. 73; *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185; *American Exp. Co. v. Patterson*, 73 Ind. 430.

Concert of action and a common intent and purpose are generally necessary to make two or more persons joint tort feorsors and jointly liable. If several distinct acts of several persons have contributed to a single injury, but without concert of action or common intent, there is generally no joint liability. Thus, in *Miller v. Highland Ditch Co.*, 87 Cal. 430, 22 Am. St. Rep. 254, the owners of different tracts of land, acting separately, constructed and maintained different ditches, whereby waters were

turned into a canyon and then commingled and passed through it and overflowed the plaintiffs' land, covering it with sand and debris. It was held that the several wrongdoers might be united in one suit as defendants to enjoin them from further injuring the plaintiffs' land, but that they were not jointly liable; that each ²⁵⁴ was liable for the separate injury produced by him, and that no joint recovery for damages could be had in such proceeding.

In rendering the decision, the court made use of this language: "It is clear that the rule as established by the general authorities is, that an action at law for damages cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. It is held that in such a case the tort of each defendant was several when committed, and that it does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however, little he might have contributed to the injury, would be liable for all the damages caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter, because no contribution can be enforced between tort feors": *Citing Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. St. 142; 98 Am. Dec. 209; *Sellick v. Hall*, 47 Conn. 260. See, also, *Gallagher v. Kemmerer*, 144 Pa. St. 509; 27 Am. St. Rep. 673; *Blaisdell v. Stephens*, 14 Nev. 17; 33 Am. Rep. 523.

If there be no concert of action between the tort feors, and their acts be separated as to place and time, but united in their consequences, the fact that it may be difficult to apportion the damages to each act or wrongdoer may be the plaintiff's misfortune, but it furnishes no good reason to make one wrongdoer liable for all the damages. But there is a class of cases in which the defendants are jointly and severally liable, although they are several and not joint tort feors. As where there is no concert of action or unity of purpose, but the acts are concurrent as to place and time and unite in setting in ²⁵⁵ operation a single destructive and dangerous force which produces the injury: *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185; *Slater v. Mersereau*, 64 N. Y. 138.

The case at bar does not come within this rule, for the different and several acts of the tort feors may produce different de-

grees of pollution. The damages must be measured by the extent of the pollution.

There is also another class of cases in which the defendants are jointly and severally liable, although they are not joint tortfeasors. If their acts are separate and distinct as to place and time, but culminate in producing a public nuisance which injures the person or property of another, they are jointly and severally liable.

In *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676, the facts were that three persons owned in severalty adjoining lots in the city of Syracuse. A continuous brick wall formed the front of the three buildings on the lots. The buildings were destroyed by fire, which left standing only the front wall and parts of the partition walls. Shortly after the fire the front wall began to incline toward the street, and afterward fell upon and killed a person lawfully on the sidewalk. The wall all fell. The material from the wall situate on two of the lots caused the injury, while no part of the material composing the wall of the other lot struck the deceased.

In an action against all three of the owners, it was found that each of the defendants were careless and negligent in not removing or supporting the wall on his own lot, and that these several neglects united and directly caused the wall to fall. The court held that the defendants were jointly and severally liable for the injury, because their conduct created a public nuisance and an indictable misdemeanor.

It is also held in *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, that persons who, by their several acts or omissions, maintain ²⁵⁶ a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequences of it.

A municipal corporation is liable in a civil action for erecting and maintaining a nuisance the same as a natural person: *Stein v. Lafayette*, 6 Ind. App. 414; *Haag v. Board etc.*, 60 Ind. 511; 28 Am. Rep. 654.

By the statutes of this state it is made a public nuisance and an indictable offense for any person to cause or suffer any offal, filth, or noisome substance to be collected or remain in any place to the damage or prejudice of others, or of the public, or for any person to erect, continue, or maintain any obstruction to the full use of property, so as to injure the property of another or, essentially, to interfere with the comfortable enjoyment of life: *Burns' Revision 1894, sec. 2154 (Rev. Stats. 1881, sec. 2066.)*

The case made by the plaintiffs' complaint in this action is that of a public nuisance, and all persons who created or continue it are jointly and severally liable for all the damages resulting therefrom, although they are not joint tort feasers. The release of Stratton did not release the city, unless it appears that it was in full satisfaction of all the injury sustained by reason of the nuisance.

It further appears by the complaint and the answers that the nuisance has been continued since July 1, 1892. Every continuance of the nuisance makes a fresh one, and he who continues a nuisance is liable to successive suits, each continuance being a new one in which there is a fresh injury and a fresh damage: *Stein v. Lafayette*, 6 Ind. App. 414; *Prentiss v. Wood*, 132 Mass. 486; *Staple v. Spring*, 10 Mass. 72; *Holmes v. Wilson*, 10 Ad. & E. 503.

One recovery does not bar subsequent actions where ²⁵⁷ the nuisance is continued. There was no error in sustaining the demurrers to the second and third paragraphs of answer.

The second paragraph of reply was addressed to the fourth paragraph of the answer. This answer was a partial answer only, and its purpose was to bar a recovery for the damages which accrued prior to July 1, 1892. The second paragraph of reply was, in effect, an argumentative denial, and there was no error in overruling the demurrer to it.

A number of questions arise under the other assignment of error, the overruling of the motion for a new trial. A reversal is sought under this assignment upon technical rather than upon substantial grounds. After examining the evidence and the instruction of the court, and taking into consideration the fact that appellant gave in evidence a contract with the plaintiffs in which it admitted that its sewer did pollute the stream, and that such pollution did injure the plaintiffs' property, and in view of the further conceded facts that these conditions were unaltered at the time of the commencement of the action, and of the meager amount of the recovery, this court is of the opinion that substantial justice has been done by the judgment rendered in the court below.

Judgment affirmed.

TORT FEASORS—JOINT LIABILITY.—If two or more persons jointly commit an actionable tort, the injured party may join them in one action or he may have separate actions against each, though he can have but one satisfaction: *State v. Boyce*, 72 Md. 140; 20 Am. St. Rep. 458, and note. When several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting

to perform it, or for performing it negligently: Wisconsin Cent. R. R. Co. v. Ross, 142 Ill. 9; 34 Am. St. Rep. 49, and especially note. See, also, the note to Russell v. McCall, 38 Am. St. Rep. 820, and the extended note to Cartersville v. Cook, 16 Am. St. Rep. 250-257.

JOINT LIABILITY—SATISFACTION.—Separate suits may be brought against several defendants for joint trespass, but whenever the plaintiff has received satisfaction from one of them for the injury he has sustained, the cause of action is discharged as to all: Selther v. Philadelphia Traction Co., 125 Pa. St. 397; 11 Am. St. Rep. 905, and extended note. If separate judgments have been obtained against two wrongdoers for the same wrong, the satisfaction of either satisfies the other except as to costs: Russell v. McCall, 141 N. Y. 437; 38 Am. St. Rep. 807, and note.

TORT FEASORS—JOINT LIABILITY—CONCERT OF ACTION. Tortfeasors are not jointly liable for damages resulting from their wrongful acts where they act separately: Miller v. Highland Ditch Co., 87 Cal. 430; 22 Am. St. Rep. 254. Where several distinct acts of several persons have contributed to a tortious result, and there was no concert of action, no common intent, there can be no joint liability: Klauder v. McGrath, 35 Pa. St. 128; 78 Am. Dec. 329.

NUISANCE—JOINT LIABILITY.—Persons who, by their several acts or omissions, maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it: Simmons v. Everson, 124 N. Y. 319; 21 Am. St. Rep. 676.

NUISANCE—CONTINUING LIABILITY.—Every continuance of a nuisance or recurrence of the injury is an additional nuisance forming in itself the subject matter of a new action: Sloggy v. Dilworth, 38 Minn. 179; 8 Am. St. Rep. 656. To the same effect see Watts v. Norfolk etc. Ry. Co., 39 W. Va. 196; 45 Am. St. Rep. 894. See, also, the extended notes to Ohio etc. Ry. Co. v. Wachter, 5 Am. St. Rep. 539, and St. Louis etc. Ry. v. Biggs, 20 Am. St. Rep. 177.

MUNICIPAL CORPORATIONS—NUISANCE.—A municipal corporation owning and occupying property for public purposes is as much subject as a private person to the rule that one must so occupy his property as not to injure that of another, and is therefore liable to an adjoining owner for injuries from a nuisance maintained by it on its property: Briegel v. Philadelphia, 135 Pa. St. 451; 20 Am. St. Rep. 885. This subject is fully discussed in the extended notes to Goddard v. Inhabitants, 30 Am. St. Rep. 395, and Fort Worth v. Crawford, 15 Am. St. Rep. 845.

BOARD OF COMMISSIONERS v. NICHOLS.

[12 INDIANA APPEALS, 315.]

JUDGMENTS—RES JUDICATA.—REJECTION OF A CLAIM by a board of county commissioners for injuries sustained by reason of a defective county bridge is not an adjudication of the matter so as to bar an action therefor in a court of competent jurisdiction.

COUNTIES—COMMISSIONERS—MINISTERIAL ACTS.—The act of a board of county commissioners, in hearing and either allowing or rejecting a claim against the county, is ministerial and not judicial.

COUNTIES—ACTS OF COMMISSIONERS.—The object of a statute requiring a claim against a county to be first filed and presented to its board of commissioners for allowance before bringing

sult thereon is to give it an opportunity to discharge its legal obligations without the expense of a lawsuit.

APPEAL—UNPREJUDICIAL ERROR.—A refusal to submit interrogatories to the jury is not reversible error when the verdict and judgment are right and the party complaining is not prejudiced by such refusal.

D. A. Kochenour, N. Cooke, B. H. Burrell, and F. Branaman, for the appellant.

A. N. Munden, J. T. Arbuckle, and J. A. Zaring, for the appellee.

315 LOTZ, J. The wife of the appellee was injured by falling from a bridge while traveling on a public highway. He brought this action to recover damages for the loss of her services and companionship, and for expenses incurred on account of medical treatment and nursing. It was alleged that the appellant was negligent in failing to keep the bridge safe and in proper repair. Issue was joined and the cause tried by a jury, which returned a general verdict for the appellee in the sum of three thousand dollars.

The first error assigned is the overruling of a demurrer to the amended complaint. **316** The complaint, in all of its essential averments, except as to the name of the plaintiff, and as to the loss of services and expenses incurred, is the same as that in the case of Board etc. v. Nichols, 139 Ind. 611, and, within the rules there announced, is sufficient.

It is next insisted that the court erred in sustaining a demurrer to the second paragraph of appellant's answer. This paragraph attempts to plead a former adjudication. It is alleged that prior to instituting this action the appellee filed his claim for the same cause of action before the board of commissioners of Jackson county, and that said board rejected and refused to allow the same, and rendered judgment that he take nothing on account thereof, and that said judgment is still in force and unappealed from.

The object of the present statutes in requiring a claim against a county to be first filed and presented to the board of commissioners for allowance before bringing suit thereon is to give it an opportunity to discharge its legal obligations without the expense of a lawsuit: Bass etc. Works v. Board etc., 115 Ind. 234. The board, in hearing such claim, acts merely in the capacity of an auditing committee. Its action is ministerial and not judicial. Any order made by it in allowing or in refusing to allow the claim does not rise to the dignity of a judicial determination or judgment. The demurrer was properly sustained to this answer.

Under the assignment that the court erred in overruling the motion for a new trial, it is insisted that the court should have required the jury to answer certain interrogatories, requested by the appellant. It was averred in the complaint that the bridge was unsafe and dangerous, because of appellant's negligence in constructing it too narrow, and in failing to put balustrades on the side.

317 One of the interrogatories requested was as follows: "Was the culvert or bridge in question too narrow?" Conceding, without deciding, that this question was proper and should have been given, it does not follow that the refusal to give it necessarily constitutes reversible error. The jury, in answer to other interrogatories, found that there were no guards or balustrades at the sides of the bridge, and that the injury resulted from this cause. If the appellant was negligent in this respect and the appellee and his wife free from contributory negligence, which latter finding is included in the general verdict, the judgment rendered was right, and the error complained of will not avail in securing a reversal.

Complaint is made of the refusal of the court to give other interrogatories. But these were properly refused within the rule laid down in *Board etc. v. Nichols*, 139 Ind. 611.

It is also contended that the court erred in giving certain instructions and in refusing others. The court instructed the jury fully on all the questions involved in the case, and they were fairly presented to the jury. After a careful examination of the whole record before us, we have arrived at the conclusion that the judgment is right and should be affirmed.

So ordered.

COMMISSIONERS — CONCLUSIVENESS OF ACTION OF.—A board of commissioners or other like body acting in a ministerial capacity cannot, by any system of rules of its own making, preclude reconsideration and correction of its erroneous action, resulting from haste and want of consideration or from intentional wrong: *McCord v. Pike*, 121 Ill. 288; 2 Am. St. Rep. 85. The action of the board of examiners in rejecting a claim for breach of contract on the part of the state is no bar to an action allowed by law upon the rejected claim: *Chapman v. State*, 104 Cal. 690; 43 Am. St. Rep. 158.

THE ALLOWANCE OF A CLAIM BY THE TRUSTEES OF A MUNICIPALITY IS A JUDICIAL ACT involving the determination of the existence of the indebtedness, and such determination is binding upon its clerk and precludes him from resisting an application for a writ of mandate to compel him to issue a warrant upon such allowance and claim upon the ground that no indebtedness in fact existed: *McConoughey v. Jackson*, 101 Cal. 265; 40 Am. St. Rep. 53, and note.

MEITZLER v. TODD.

[12 INDIANA APPEALS, 381.]

LIMITATION OF ACTIONS.—PARTIAL PAYMENTS OF THE PRINCIPAL and payment of the interest stand on the same footing as affecting limitation of action.

LIMITATION OF ACTIONS—PARTIAL PAYMENTS AS AFFECTING SURETY.—Partial payments made by a principal without the knowledge of the surety do not operate to keep the obligation alive as to the surety. It may be barred as to the latter by limitation.

LIMITATION OF ACTIONS.—PARTIAL PAYMENTS made by a principal keep the obligation alive as to himself, although it may become barred as to the surety.

J. B. Martin and J. H. Voliva, for the appellant.

S. M. Shepard, for the appellees.

381 LOTZ, J. On the first day of April, 1882, Charles W. Todd and Clayton H. Todd executed their joint promissory note, by which they agreed to pay to the order of the appellant, one day after the date thereof, the sum of one thousand dollars. Charles W. was the principal and Clayton H. was his surety. Charles W. made payments of the interest on said note annually, the last payment being made on the first day of April, 1892. These payments were all indorsed on the note and were made without the knowledge of Clayton H. This action was instituted on the fourteenth day of March, 1893. Clayton H. Todd answered the ten year statute of limitations, to which the appellant replied the payments made. The court tried the cause and made a special finding of the facts and stated conclusions of law thereon. The facts, as found, are substantially as above set out. The court rendered judgment in favor of the appellant for the balance due on the note as against the principal maker and rendered judgment in favor of the surety, Clayton H. Todd.

382 Had there been no payments made on the note it would have been barred both as to the principal and surety: Burns' Revision 1894, sec. 294, subd. 5 (Rev. Stats. 1881, sec. 293).

Part payment of the principal and payment of interest stand on the same footing. Payment is regarded as an acknowledgment of an existing obligation, and from such acknowledgment a promise to pay the debt may be implied: Conwell v. Buchanan, 7 Blackf. 537. Each payment starts the statute afresh from its date.

The appellant contends that the payments made by the principal which operated to keep the note alive as to him operated to keep it alive as to the surety also, although the surety had no

knowledge of them. It was held by Lord Mansfield in *Whitcomb v. Whiting*, 2 Doug. 652, that payment by one joint debtor was payment for all, and that an acknowledgment by one was acknowledgment for all and would take the obligation out of the statute as to all. This rule has not been accepted in this country except in a few states: Wood on Limitations, sec. 285.

In this state it has been expressly held that a payment made by one joint debtor or joint and several debtor does not take the obligation out of the statute as to the other debtor who had no knowledge of the payment: *Bottles v. Miller*, 112 Ind. 584; *Yandes v. Lefavour*, 2 Blackf. 371. See, also, *Bell v. Morrison*, 1 Pet. *351; *McMullen v. Rafferty*, 89 N. Y. 456.

Judgment affirmed.

LIMITATIONS OF ACTIONS—EFFECT OF PAYMENT OF INTEREST.—The payment by the principal year by year of the interest on a joint and several promissory note will prevent the operation of the statute of limitations in favor of a surety to the note: *Schindel v. Gates*, 46 Md. 604; 24 Am. Rep. 526. The payment by one joint obligor of interest due on a bond before the bar of the statute of limitations has attached will take the same out of the operation of the statute as against his co-obligors: *Whitaker v. Rice*, 9 Minn. 13; 86 Am. Dec. 78. See also, the extended note to *Jones v. Perkins*, 64 Am. Dec. 138-143.

SURETYSHIP—PART PAYMENT.—Part payment of the amount due will not discharge the surety even where it is agreed that such part payment shall have that effect: *Oberndorf v. Union Bank*, 31 Md. 126; 1 Am. Rep. 31. A part payment by the principal promisor will take the case out of the statute of limitations as to the sureties on a promissory note: *Hunt v. Bridgham*, 2 Pick. 581; 13 Am. Dec. 458.

SOURWINE v. SUPREME LODGE, KNIGHTS OF PYTHIAS.

[12 INDIANA APPEALS, 447.]

INSURANCE—BENEFIT ASSOCIATIONS—EQUITABLE RIGHTS OF MEMBER.—If a member of a beneficial association in good standing, and entitled under its constitution and by-laws to be transferred from one endowment class to another, requests to be so transferred, and does all that can be required of him to entitle him to enter such class and his request is wrongfully and arbitrarily refused, equity, after his death, regards that as done which in good conscience ought to have been done, and grants relief as though it had been done, although the member never compelled the transfer by mandate, as he might have done.

INSURANCE—BENEFIT SOCIETIES.—The constitution and by-laws of a beneficial association are elements of, and enter into, its contracts of insurance, and, while they measure and determine the members' duties and liabilities, also measure his rights as well.

INSURANCE—ESTOPPEL.—As a party cannot take advantage of his own wrong, an insurer cannot complain of a hardship which he has imposed upon himself by his own wrongful act.

INSURANCE—BENEFIT SOCIETY—WAIVER OF RIGHTS. A member of a beneficial association in good standing who is entitled to a transfer to another class of membership, which he requests the association to make, does not waive his legal and equitable rights or acquiesce in the wrongful refusal of the association to transfer him, merely because he does not commence a proceeding in mandamus to compel such transfer, or make a formal tender of dues as a member of the class to which he is entitled to be transferred.

A. W. Knight, for the appellants.

E. S. Holliday and G. A. Byrd, for the appellee.

447 GAVIN, J. The correctness of the trial court's action in sustaining the demurrer to appellants' complaint is brought in review before us.

The appellants are the beneficiaries of one Jonathan **448** Croasdale, who, in 1877, was admitted as a member of the appellee's endowment rank, entering classes 1 and 2, which entitled him to one thousand dollars and two thousand dollars respectively. At that time all members paid at the same rate. In 1884 the constitution of the order was so amended as to establish a "fourth class," in which the amounts to be paid were graduated according to age. Provision was then made for transfers from the original classes to this class up to May, 1885, the time being afterward extended to October, 1885. Croasdale, being an old man, declined to transfer because of the heavier assessments, as he had a right to do.

In 1888, the constitution was again amended, permitting transfers from the old divisions. By the constitution then in force, section 1, article 3, "an applicant for admission to membership in the endowment rank must be a Knight of Pythias in good standing, not over fifty years of age, be recommended by some competent practicing physician appointed by the board of control of the endowment rank, and be examined in accordance with the published rules for medical examiners on the form provided by said board of control, which must be approved by the medical examiner in chief, and the necessary fee paid before he can take the obligation admitting him to membership."

It was further provided that "all present members of the first, second, and third classes of the endowment rank in good standing in the rank may be admitted to the fourth class by complying with the requirements of section 1 of this article, and the surrender of the endowment certificate or certificates held in said

first, second, or third classes. In these cases the limitation as to age shall not apply.

In March, 1889, said Croasdale, being then a member in good standing of the first and second classes in said ⁴⁴⁹ endowment rank, asked to be transferred to the fourth class.

He was duly examined in accordance with the published rules for medical examiners on the form provided by appellee's board of control, by a competent practicing physician regularly appointed by appellee. By said examination it was ascertained that said Croasdale was in perfect mental and physical health and condition, and he was unconditionally recommended by such physician. The application and medical examination with the proper fees were duly forwarded to the appellee's medical examiner in chief by Croasdale, who also offered to surrender his certificates, but on March 18, 1889, said examiner in chief arbitrarily, and without any valid and legitimate excuse or cause, disapproved said examination and rejected the application peremptorily because of his age, and for no other reason.

On March 20, 1889, in response to an inquiry, he again declined to entertain it. On the same day, the application was again renewed and forwarded to the examiner with the examination as before, but it was again rejected as before.

On January 30, 1891, the matter was laid before the supreme secretary and board of control, who again rejected the application and approved the action of the medical examiner in chief, all being done arbitrarily and without any justifiable valid and legitimate cause, although said Croasdale was in all respects possessed of all the requirements provided for, and had, in all things, complied with the laws, rules, and regulations entitling him to such transfer, and was then, and continued to the time of his death, ready and willing to pay all dues, fees, and assessments called for, and to comply with all of appellee's rules and regulations.

⁴⁵⁰ On May 5, 1892, said Croasdale died. The first and second classes had then become so depleted that they paid but trifling sums to beneficiaries. Proper proofs were made and appellants in this action seek to recover upon the ground that Croasdale was equitably a member of the fourth class.

Clearly, Croasdale possessed all the necessary qualifications, complied strictly with the requirements of appellee's constitution, and was, in fact, entitled to be, and under the allegations of the pleadings, ought to have been, transferred.

Appellee's position is, that nevertheless he was not transferred in fact, and could not be without the approval of the medical examiner in chief, and for this reason his beneficiaries cannot recover. It is further contended that he had, by not asserting his legal right to the transfer and not tendering his dues, acquiesced and abandoned his right to the transfer.

The constitution and by-laws of such an organization are elements of the contract of insurance. They measure and determine the member's duties and liabilities, and not only these but his rights as well: *Supreme Lodge v. Knight*, 117 Ind. 489. Not only the private members, but the officers, are under obligation to conform their conduct to them. Under the averments, the action of the medical examiner in chief, in rejecting the application solely by reason of Croasdale's age, was in direct violation of the constitution.

Croasdale's fellows in the first and second classes had been permitted to transfer, and thus his classes had been depleted. In so doing they and the association only exercised their legal right, but the right to follow them was vested, by the constitution, in Croasdale. He was already a member of the rank, and this right of transfer ⁴⁵¹ was a contract right, and a beneficial one of which the officers could not arbitrarily deprive him: *Supreme Council etc. v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; *Supreme Lodge v. Knight*, 117 Ind. 489.

His position was manifestly radically different from that of one who was not a member of the organization, but was seeking admission into its ranks, as in the case of *Matkin v. Knights of Honor*, 82 Tex. 301; 27 Am. St. Rep. 886. The contractual rights and obligations were already existing between him and the association.

Having done everything that was to be done by him to effectuate the transfer, and being in all things entitled to it, it did not rest in the discretion of the examiner to refuse him. Had the examiner refused him because he was not, in his judgment, possessed of the proper physical qualifications, it might well be that the examiner's action, in the absence of fraud or mistake, at least, would be final and conclusive against him; but no such question is here presented. On the contrary, the disapproval is arbitrary and without cause solely by reason of his age, which, by the express letter of the society's law, is not a reason for rejection.

Here is a manifest wrong. Yet it is asserted that although there was a wrong there is now no remedy. To so hold would

be, to use a favorite phrase of Judge Elliott's, a reproach to the law. The arm of the law has not been so shortened as to leave the appellants remediless.

If the application of the stricter rules of law, as formerly administered, do not furnish the remedy, the more expansive and beneficent principles of equity are ample for the purpose.

An eminent law-writer speaks thus: "Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, the adaptability to ⁴⁵² circumstances, and the natural rules which govern their use. There is, in fact, no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties": 1 Pomeroy's Equity Jurisprudence, sec. 109.

Again he says, at section 111: "It has, therefore, never placed any limit to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."

While this case is one of a peculiar nature, *sui generis*, for which neither the counsel nor the court have found any direct precedent, the application of a familiar rule of equity furnishes, as it seems to me, a safe guide to its disposition.

That this application ought to have been approved, and that the transfer ought to have been made, cannot be successfully controverted, nor are these propositions denied by appellee's counsel. They assert, however, that while these things ought to have been done they were not. Equity furnishes the remedy for just exactly that state of affairs, for the very first maxim with which we meet in equity is, that it "will regard that as done which in good conscience ought to be done." This principle has been applied, says the same author, "to every instance where an equitable right, with respect to the subject matter, rests upon one person toward another; to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party and a ⁴⁵³ corresponding equitable right is held by another party": Pomeroy's Equity Jurisprudence, sec. 364, 369, 370.

In *Kentucky etc. Ins. Co. v. Jenks*, 5 Ind. 96, it was objected that there could be no recovery because no policy had issued, but

the court said: "Jenks having been entitled to a policy in his lifetime, a court of equity will consider that done which should have been done," and sustained a decree for a satisfaction.

So, also, in *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362; 31 Am. Rep. 732; and *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, where insurance contracts were to be, but had not been, issued, it was held that equity would enforce payment of the losses directly without there having been a previous decree for specific performance.

So equity will grant relief here, although Croasdale never in his lifetime compelled the transfer, by mandate, as he might have done.

We do not think it lies in appellee's mouth to complain that some hardship may be imposed on it by reason of his failure to insist on his rights in a court of law before his death. For whatever hardship may arise therefrom, appellee, and not he, is responsible.

Neither do we think that appellee is in a position to take any advantage from the plea that by allowing this action appellants are permitted to reap the benefits of Croasdale's membership without his having borne the burdens. That he did not bear these burdens during the fifteen months after the final rejection of his application for transfer was due entirely to the wrongful conduct of appellee, and can in no degree be ascribed to any delinquency upon his part. Whatever unpleasant results may follow from appellee's own misconduct should be borne by appellee, and cannot be shifted to others who are wholly innocent.

⁴⁵⁴ It is a well known maxim that parties are not to be permitted to take advantage of their own wrong.

In *Jackson v. Northwestern etc. Relief Assn.*, 78 Wis. 463, we find a case closely analogous to the one under consideration. The membership of the deceased had there been declared forfeited, but there was, under the by-laws, a right to reinstatement on certain terms, among which was furnishing a satisfactory certificate of health. The member took the necessary steps, and mailed the application and money, with the proper certificate of health, but died before these were received at the office of the association, which thereupon, after notice of her death, rejected the application for reinstatement.

It is said by the supreme court, per Orton, J.: "The court instructed the jury on that subject as follows: 'That Mrs. Jackson was dead before the reinstatement and money reached Madison, if you find such to be the fact, was good cause for the disapproval of her application.' This instruction was also erroneous. If

Mrs. Jackson mailed the papers and money in proper time, according to the by-laws or the custom of the company, her rights became fixed by it, and her subsequent death, before the package reached the company, could not change them. She had done all that the company required of her by the notice of reinstatement."

Again it is said: "The court erred also by instructing the jury that the company had the right to reject her application for reinstatement 'upon the ground that it did not consider her statements in regard to health sufficient.' If Mrs. Jackson secured any right whatever by so responding to this last reinstatement notice of the company, then the certificate of health she sent with the other papers and the money did not depend upon how the company considered it, but upon its sufficiency in fact."

⁴⁵⁵ Thus it is held that one may be by the courts regarded as entitled to the rights of membership although not recognized as such by the officers.

By deducting from the sums due appellants the amount of dues which would have been collectible from Croasdale in the fourth class, appellee will be in the same position it would have occupied had it complied with the requirements of its own laws and made the desired transfer. Appellee's laws are, as we have said, made for the government of its officers, as well as its members. Had the officer obeyed the law, as Croasdale did, all controversy would have been avoided.

After Croasdale had so fully complied with appellee's rules we do not think he can be deemed to have acquiesced in its officer's wrongful conduct and to have abandoned his legal and equitable rights merely because he did not commence a mandate or make a formal tender of fourth class dues, which would have been useless in the face of appellee's continued refusal to make the transfer, which was equivalent to an announcement that it would not receive dues from him in that class.

Our conclusion, therefore, is that the trial court erred in sustaining the demurrer to the complaint.

Judgment reversed.

Reinhard, J., did not participate.

INSURANCE—BENEFIT ASSOCIATIONS.—The constitution and by-laws of a mutual benefit society enter into and become a part of the contract of insurance: *Extended notes to Lake v. Minnesota etc. Relief Assn.*, 52 Am. St. Rep. 558; and *Bankers etc Assn. v. Stapp*, 19 Am. St. Rep. 790.

INSURANCE.—ESTOPPEL OF MEMBER of a mutual benefit association to complain of hardships brought upon him by his own conduct is discussed in the extended note to *Lake v. Minnesota etc. Relief Assn.*, 52 Am. St. Rep. 550-552.

BURKE v. LUKENS.

[12 INDIANA APPEALS, 648.]

LIENS—STREET ASSESSMENTS—PRIORITY.—The last assessment for street improvements takes precedence as a lien over those previously made.

T. B. Orr, for the appellant.

L. B. Jackson, G. Harper, F. S. Ellison, and W. A. Sprong, for the appellee.

648 ROSS, C. J. The question presented by the record in this case involves the determination of the priority of liens.

The question arises upon the facts found by the court in its special finding, which are conceded to be correct, and are as follows: That on the twenty-eighth day of May, 1892, one Harrison J. Gregory was the legal owner of lot 287, in Hazelwood addition to the city of Anderson, in Madison county, and state of Indiana; that on said day said Gregory and his wife mortgaged said lot to "N. C. McCullough & Co.," a partnership firm; that all of the partners in said firm were properly made parties in this suit; that said mortgage was given to secure the payment of the note of the said Gregory in the sum of one hundred and twenty-five dollars and interest, and that said mortgage was duly recorded in the recorder's office of said county on the twenty-eighth day of May, 1892, and that said note is still unpaid; that on September 9, 1892, the common council of **649** said city of Anderson, by proper order entered of record, ordered and directed the improvement, by the grading and graveling of 22d street from Madison avenue to Harrison street in said city; that said lot has a frontage lengthwise on said 22d street of one hundred and twenty-seven feet; that on October 3, 1892, the said council let the contract for the improvement of said street to Lukens & Turner, who entered into contract and bond as required by said council for the improvement of said street; that the said contractors completed said improvement according to the plans and specifications therefor, and that the said work was accepted by the common council of said city on November 15, 1892, and a final assessment was made on said day, by said council, on all the lands and lots abutting thereon, to pay the cost of said improvement, by which assessment said lot 287 was assessed the sum of ninety-five dollars and twenty-five cents, its proportionate share of the total cost of said improvement; that said assessment was, at the commencement of this suit, and still is, due and remains wholly unpaid, and that twenty-five dollars is a reasonable attor-

ney's fee for the cross-complainant Lukens' attorney for his services rendered herein, and that the defendant Turner has no interest in said assessment, and that the whole amount thereof belongs to the cross-complainant, Benjamin Lukens; that on September 12, 1892, the common council of the said city of Anderson, Indiana, ordered the improvement of Locust street, from Pendleton avenue to Eleventh street in said city, by grading, graveling, curbing, and bouldering the said street according to specifications provided therefor; that said lot has a frontage, endwise, on said Locust street of fifty feet; that said improvement was ordered made under and according to the provisions of what is commonly known as the "Barrett law" of Indiana; that on October 3, 1892, the said council let the contract for the improvement of said Locust street to this plaintiff, Newton ⁶⁵⁰ Burke, who entered into contract and bond as required by said council for the improvement of said Locust street; that said Newton Burke completed said improvement according to the plans and specifications therefor, and that said work was duly accepted by said council of said city, on July 10, 1893, and on August 14, 1893, the said council made, approved, and confirmed the final assessment of the cost of said improvement on all of the lots and lands abutting on said Locust street, by which assessment the said lot 287 was assessed the sum of eighty-one dollars and fifty cents, its pro rata share of the total cost of said improvement; that said assessment was not waived, and has never been paid, and was at the commencement of this suit due; that twenty-five dollars is a reasonable fee for plaintiff's attorney for services rendered herein; that the defendant Winfield T. Durbin is now and was at the commencement of this suit the owner and holder of the legal title to said lot. Each of the other defendants not specially named in this decree has no interest in the subject matter of this suit."

Upon these facts the court concluded as follows: "The court states as its conclusions of law upon the foregoing facts that said Lukens and said Burke each have a lien upon said lot, which they are each entitled to have foreclosed herein; that the lien of said Lukens is superior to the lien of said Burke, and that said liens should be foreclosed accordingly."

The statute, section 4290 of the Revised Statutes of 1894, (E. S., sec. 814), provides that assessments for street improvements, "with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting taxes."

It is contended, however, by appellant that although the assessment for the street improvement under which ⁶⁵¹ his lien accrued was made subsequent to that under which appellee claims and for an improvement made after that under which appellee's lien accrued, yet that liens for such improvements stand upon the same footing as liens for taxes, the last one made becoming the superior lien.

The statute, section 4290, of the Revised Statutes of 1894, creating the lien, provides that it shall have precedence over all other liens, excepting taxes. A strict construction of the wording of the statute fully warrants appellant's assumption that the last lien of this kind acquired must have precedence over all other liens of a like character. The theory of the law is, that every improvement of this character to the extent of the improvement enhances the value of the property. So every improvement made increases the security for the payment of assessments previously made. The only lien over which an assessment for street improvements shall not take precedence is that for taxes. It follows, therefore, that the last assessment for such improvement must take precedence as a lien over those previously made. The court, therefore, erred in concluding that the appellee's lien was senior to the appellant's.

Judgment reversed, with instructions to the court below to restate its conclusions of law in conformity with the views heretofore expressed.

LIENS—PRIORITY.—The common law, in the absence of statutory regulation, establishes liens in the order of priority of their acquisition, the first in order of time standing first in order of rank: *Voorhis v. Westervelt*, 43 N. J. Eq. 642; 3 Am. St. Rep. 315. As between lienors whose equities are equal, the first in point of time takes precedence: *Booth v. Bunce*, 33 N. Y. 139; 88 Am. Dec. 372.

CASES
IN THE
SUPREME COURT
OF
IOWA

KEEFE v. CHICAGO & NORTHWESTERN RAILWAY Co.

[92 Iowa, 182.]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—One employed in the yard of a railway company in the presence of tracks and cars and engines moving thereon must be reasonably diligent in guarding against accidents, and especially to keep out of the way of moving engines and cars.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.—One who is himself negligent on the tracks in the yard of a railway, and is there injured by being struck by a locomotive, cannot recover for that injury merely because the persons in charge of the locomotive were negligent in not seeing him, and therefore did not take the measures necessary to insure his safety.

NEGLIGENCE IN INJURING NEGLIGENT PERSON.—There can be no recovery for damages caused by negligence to which the person injured contributed, but when the negligent act which caused the injury is done after the negligence of the injured party is known to the other party, and the injury might have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery.

Hubbard & Dawley, for the appellant.

L. A. Ellis and Walsh Brothers, for the appellee.

183 **ROBINSON, J.** On the twenty-fifth day of February, 1889, James Keefe was struck and killed by a locomotive engine of the defendant on its grounds in Clinton. At the time of the accident, Keefe was between sixty-five and sixty-seven years of age, and his hearing and eyesight were good. He had worked in Clinton on the railway track for twenty-five years, and, for four

or five years preceding his death, had worked around the depot and in the yard of defendant, at such work as the roadmaster from time to time required him to do. On the day of the accident he was engaged with a shovel on a track known as "No. 2," which extends from the east in a westerly direction across Fourth street. At about 11 o'clock in the morning, an engine known as "No. 61" was taken from the roundhouse for the purpose of hauling out a special train. It was headed eastward, and was backed westward on the roundhouse track, thence over a connecting track to track No. 2. At that time an engine known as "Engine No. 561" was moving eastward on that track, and, to avoid it, engine No. 61 was backed eastward until it had cleared the connecting track mentioned, and stopped. Engine No. 561 was run from track No. 2 over the connecting track onto the roundhouse ¹⁸⁴ track. When track No. 2 was cleared, engine No. 61 was backed westward over it. At a point about one hundred feet west of the connecting track, the tender struck Keefe as he was standing on the track near the north rail, and knocked him down. He was run over and crushed, and dead when the engine was stopped.

The plaintiff claims that the accident was caused by negligence and want of care on the part of defendant in operating the engine. That is denied by defendant. There is much conflict in the evidence, but some of it tended to show, and the jury could have found, that it established, the following: Engine No. 61 was moved slowly and its bell was rung constantly after engine No. 561 passed, and until after the accident occurred. A few moments before Keefe was struck he was stooping over, and appeared to be doing some work with his shovel, but after the tender was within ten or fifteen feet of him he was standing erect, looking westward, and doing nothing else. Had he been attentive to his surroundings, he could easily have heard engine No. 61 as it approached, and avoided it. There was nothing to prevent him from both seeing and hearing it from the time it was passed by engine No. 561 until it reached him. He was familiar with the kind of work done in the yard, and with the movement of engines. It is certain that he was in a place of danger. The presence of the tracks, and cars thereon, and the movement of engines, were constant warnings to him of danger. It is the duty of persons employed in such places to be reasonably diligent in guarding against accidents, and especially to observe and keep out of the way of moving engines and cars. They have no right to rely wholly upon the persons in charge of them to prevent

accidents, but must use due care to avoid danger. These rules are founded upon the necessities of the business of operating railways. ¹⁸⁵ They are reasonable and just, and are fully sustained by the decisions of this and other courts: *Collins v. Burlington etc. Ry. Co.*, 83 Iowa, 346; *Magee v. Chicago etc. Ry. Co.*, 82 Iowa, 250; *Haden v. Sioux City etc. Ry. Co.* (Iowa, May 19, 1891), 48 N. W. Rep. 733; *Elliott v. Chicago etc. Ry. Co.*, 150 U. S. 245; *Aerkfetz v. Humphreys*, 145 U. S. 418. The jury would have been justified in finding that the negligence of Keefe contributed to the accident.

Notwithstanding that fact, the district court charged the jury as follows:

"17. If you find from the testimony that the track upon which the engine was backing was a straight one, and that the accident happened in broad daylight, that there was no object on the track that would prevent the engineer or fireman from seeing the said Keefe, and that the said Keefe was visible, then, and on your so finding, you are instructed that it was their duty to see him, and to have observed whether or not he was getting out of the way of the approaching engine; and their failure to see him would be a want of ordinary care on their part, and the defendant would be liable, provided that, by the exercise of ordinary care in looking, they could have seen said Keefe in time to see he was not getting out of the way, and by his actions to know that he did not appear to observe or know of their approach, and that they had time, after they had seen him, or by the use of ordinary care could have seen him, to have sounded the whistle or stopped the engine before striking and injuring the said Keefe, from which injury he died." Objection is urged to this for the reason that it made the defendant liable for the failure of its engineer and fireman to use ordinary care to discover Keefe in time to have avoided the accident, without regard to contributory negligence on his part. We are of the opinion that the objection is well founded. It is a well-established rule of this ¹⁸⁶ state that there can be no recovery for damages caused by negligence to which the person injured contributed. But when the negligent act which causes an injury is done after the negligence of the injured party is known to the other party, and the injury could have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery: *Morris v. Chicago etc. Ry. Co.*, 45 Iowa, 29; *Deeds v. Chicago etc. Ry. Co.*, 69 Iowa, 164; *Romick v. Chicago*

etc. Ry. Co., 62 Iowa, 167; McKean v. Burlington etc. Ry. Co., 55 Iowa, 192; O'Rourke v. Chicago etc. Ry. Co., 44 Iowa, 531; Cooper v. Central R. R. Co., 44 Iowa, 138; Spencer v. Illinois Cent. R. R. Co., 29 Iowa, 55. This exception depends upon the failure of the person who is sought to be made liable for the injury to use reasonable care to avoid it after the negligence of the other party is known. It is not sufficient that means of knowledge were available, and not used, unless in an exceptional case. To hold the defendant liable for the failure of its employes to use due care to ascertain the danger which Keefe was in, without regard to his negligence, is to make the defendant absolutely liable for its failure to exercise due care, and to ignore the doctrine of contributory negligence. The care necessary to have discovered the presence of Keefe on the track was only a part of that which was due from the defendant to warn him of his danger, and to avoid injuring him. It cannot be regarded as a separate and distinct duty. The conclusion we have reached makes it unnecessary to determine other questions presented in argument. The court erred in giving the seventeenth paragraph of the charge, and the facts disclosed by the record are such that the error may have been prejudicial.

The judgment is reversed.

NEGLIGENCE—CONTRIBUTORY—EFFECT OF.—The contributory negligence of a party injured, when clearly established by evidence substantially uncontradicted, is to be adjudged a defense as a matter of law by the court: *Victor Coal Co. v. Muir*, 20 Col. 320; 46 Am. St. Rep. 299, and note. See, also, the extended notes to *Johnson v. Hudson River R. R. Co.*, 75 Am. Dec. 383, and *Freer v. Cameron*, 55 Am. Dec. 667.

RAILROADS—CONTRIBUTORY NEGLIGENCE OF SERVANT. An engineer will not be adjudged guilty of negligence as a matter of law, merely from the fact that he stood upon the track from five to thirty seconds without looking for approaching cars, when he had no reason to apprehend the approach of the car by which he was injured: *Barry v. Hannibal etc. Ry. Co.*, 98 Mo. 62; 14 Am. St. Rep. 610, and note. When an employe of a railroad, engaged in its yard, is struck and killed by a switch engine, alleged to have been running at an unlawful rate of speed at the time of the accident, evidence that it was the universal custom in the yard to run switch engines faster than the lawful rate of speed, and that the deceased knew it, is admissible on the question of his contributory negligence in an action against the company to recover for the injury: *Abbott v. McCadden*, 81 Wis. 563; 29 Am. St. Rep. 910, and note.

IN RE BENTON.

[92 IOWA, 202.]

A FOREIGN GUARDIAN of a nonresident minor is, by the statutes of Iowa, authorized to receive the property of such minor situate in that state on compliance with the conditions prescribed by such statutes.

MINORS, JURISDICTION OVER—DOMICILE.—The courts of the state of the domicile of a child have jurisdiction of the matter of the guardianship of his person. The domicile of the child is to be determined by that of his parent, and, when once fixed, remains until another is lawfully acquired.

NATURAL GUARDIANS OF CHILDREN, WHO ARE.—Where the parents of a minor are dead, its grandfather or grandmother, when the next of kin, is his natural guardian.

A CHILD ACQUIRES THE DOMICILE of its grandparents and loses that of its parents when, after their death, it takes up its residence with the former.

CHILD, DOMICILE OF.—A CHANGE in the domicile of a child may be effected by its grandparents with whom it is residing after the death of its parents.

A GUARDIANSHIP OF THE PROPERTY OF MINORS in Iowa will be discontinued, and the property directed to be paid over to the guardian of their person appointed in another state of which they had acquired a domicile through being taken to that state to live with their grandparents after the death of their parents.

Fruit & Brindley, Utt Bros. & Michel, for the appellant.

G. W. Ruddick, for the appellee.

203 DEEMER, J. Manley J. Benton, father of George O. Benton and Grace Benton, died intestate at Waverly, Iowa, on the fifteenth day of September, 1892. He left surviving him these minors, aged twelve and ten years, respectively. His wife, the mother of these children, died about two years previous. Before the death of the wife and mother, the petitioner, who is the paternal uncle of the minors, at the request of Manley J. Benton and his wife, took Grace Benton to his home in Wisconsin, and from that time until the present has supported and cared for her. At the time of the father's death, there being no next of kin in Iowa, petitioner took the boy, George O. Benton, to Wisconsin, and into his family, and has ever since supported him. The paternal grandfather of the children lives with the petitioner in Wisconsin. On the first day of November, 1892, the petitioner was appointed guardian of the persons and property of said minors by the county court of Trempealeau county, in the state of Wisconsin, and gave his bond as such. His bond, at the time of the filing of the application herein, amounted to the sum of four thousand dollars. Manley J. Benton had a life insurance policy, issued by an Iowa company, for two thousand dollars, twelve

hundred dollars of which was made payable to Grace and eight hundred dollars to George O. Benton. This was all, or practically all, the property he left. On the twelfth day of November, 1892, E. L. Smalley, of Waverly, in Bremer county, Iowa, upon the petition of one J. R. Smith, was appointed guardian of the property, but not of the persons, of the minors. Smalley afterward collected the face of the insurance policy, and is now holding the same by reason of his appointment as guardian. The petition in this case was for an order for the transfer of this money to the petitioner, as guardian in Wisconsin, ²⁰⁴ under sections 2269-2271 of the code. The court, after hearing the proofs, denied the petition, and this ruling is assigned as error.

The code, section 2269, provides: "Foreign guardians of non-resident minors may be authorized by the district court of the county wherein such minor has personal property to receive the same, on complying with the provisions of the following sections."

"Section 2270. Such foreign guardian shall file in the office of the clerk of the district court, in the county where the property is situated, a certified copy of his official bond, duly authenticated by the court granting the letters of guardianship, and shall also execute a receipt for the property received by him."

"Section 2271. Upon the filing of the bond as provided by the last section, and the court being satisfied with the amount of said bond, said court shall order the personal property of the minor to be delivered to the guardian; and the court shall spread the bonds and receipt on its records, and direct the clerk to notify, by mail, the court granting the letters of guardianship of the amount of property allowed to the guardian, and the date of the delivery of the same." The applicant fully complied with the provisions of these sections, filed a duly authenticated and certified copy of his bond given in Wisconsin with the clerk of the Bremer county district court, which bond was for four thousand dollars, and was sufficient in amount, and was ready to execute his receipt for the money as required by the statute: It is claimed by appellee: 1. That the petitioner had no standing in court, because he had not been appointed in this state; 2. That he was not a foreign guardian of nonresident minors, that the minors were yet residents of this state, and that the appointment of Benton in Wisconsin was without jurisdiction; 3. That Benton was not a proper person to have charge and control of either the children or their property.

²⁰⁵ The first of these claims is answerable by the statute it-

self, which, if not in express terms, by necessary implication, authorizes such a guardian to apply for an order of transfer. With reference to the second, it is a well-established rule of law that the proper court at the place of domicile of the child has jurisdiction of the matter of guardianship of his person. And a person may have a domicile at one place while he is a resident of another: *Love v. Cherry*, 24 Iowa, 204. The domicile of a child is to be determined by the domicile of the parent; and when the domicile is once fixed, it remains until another is lawfully acquired: *Schouler on Domestic Relations*, sec. 230. The domicile of these minors at the time of the death of their father was in Waverly, and they could do nothing to change their domicile, for they were not sui juris: *Jenkins v. Clark*, 71 Iowa, 552. Under our statutes, the parents are the natural guardians of their minor children, and are equally entitled to the care and custody of them: *Code*, sec. 2241. At common law, although some of the books speak only of the father, or, in case of his death, the mother, as guardian by nature, yet it is clear that the grandfather or the grandmother, when next of kin, is such a guardian: *Lamar v. Micou*, 114 U. S. 218; *Hargraves*, note to *Coke on Littleton*, 88, 6-12; *Reeve on Domestic Relations*, 389; *Darden v. Wyatt*, 15 Ga. 414. "After the death of both parents, infants, who take up their residence at the home of the next paternal grandparent or next of kin, in another state, will acquire such grandparent's domicile: *Schouler on Domestic Relations*, sec. 303. While our statute does not in terms make the next of kin guardians by nature, yet it does hold them responsible for their support: *Code*, sec. 1331. Being so held, it seems to us that they should, in the event of the death of both parents, be entitled to the custody of their grandchildren, ²⁰⁶ and that the common-law rule, that they are guardians by nature, should obtain in this state. Guardians by nature have the right to change the domicile of their wards, if done in good faith. And while the next of kin may not change it, so as to affect their rights of succession or of property, yet, if the change is made in good faith, a new domicile may be acquired, which will give a probate court jurisdiction to appoint a guardian at law for them. In this case, the grandfather is living with, and is a member of, the petitioner's family, and he signed the petition for the appointment of David M. Benton as guardian in the Wisconsin county court. The children, or one of them, were taken by David Benton to Wisconsin at the request of the grandfather; and the paternal grandfather, petitioner, and the children all live together as one family.

These facts distinguish the present case from *Jenkins v. Clark*, 71 Iowa, 552, and *In re Johnson*, 87 Iowa, 130, and sustain the jurisdiction of the Wisconsin court. The right of possession and control of the persons of these minors is not involved in the case, and the fitness of the Wisconsin guardian to be intrusted with their support and education is not a material inquiry. The sole question is, Should the money in the hands of the guardian appointed in this state be ordered transferred to the guardian in Wisconsin?

Having determined that the county court in Wisconsin had jurisdiction to appoint a guardian of the person and property of these minors, we next inquire what necessity is there for the continuance of a guardianship of their property in this state? No doubt such an appointment was necessary in order to collect the money due on the policy of insurance, but, with the money collected, the necessity for a guardian here has ceased. There is no showing that the money could be invested to better advantage ²⁰⁷ here than in Wisconsin, nor is there any presumption that its remaining here would be of any benefit to the estate. On the contrary, it seems to us that it would be a detriment to have the estate bear the expense of two guardianships. The guardianship here was simply auxiliary to the main guardianship, and the purpose of its creation has been accomplished. We think that the estate of these minors should be relieved of the trouble and expense incident to a guardianship in this state, and that the principal guardian should be invested with the money now in the hands of the guardian here. Some question is made as to the responsibility of the Wisconsin guardian. We do not regard this as a material point, for the certified copy of the bonds filed by him in Wisconsin shows them to be amply sufficient to protect the minors' interests. We do not determine whether the statute with reference to the transfer of funds is mandatory or not; for, if it gives the court merely discretionary powers, we think there was error in not ordering a transfer of the funds. The case will be reversed, with directions to the district court to order a transfer of the funds upon petitioner's filing the receipt required by law.

Reversed.

GUARDIAN AND WARD—POWER OF FOREIGN GUARDIAN. A foreign tutor appointed by a court in a foreign country, which is the domicile of the ward, may, under sanction of the court where the ward's property is situated, do acts in relation thereto which the interests of his ward require: Succession of Lewis, 10 La. Ann. 789; 43 Am. Dec. 600, and note. Where an infant resides in another state,

but has property here, and has guardians appointed in both jurisdictions, the foreign guardian has the custody of his person and the domestic guardian has control of his property, and neither can interfere with the other: *Kraft v. Wickey*, 4 Gill & J. 332; 23 Am. Dec. 569, and note. This subject is fully treated in the extended note to *Earl v. Dresser*, 95 Am. Dec. 666-670.

GUARDIAN AND WARD—NATURAL GUARDIAN.—A father is the natural guardian of his infant child: *Earl v. Dresser*, 30 Ind. 11; 95 Am. Dec. 660; *Taylor v. Jeter*, 33 Ga. 195; 81 Am. Dec. 202, and note.

GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN—JURISDICTION.—The appointment of a guardian of children who reside in another state is void, as they were not within the jurisdiction of the court: *Boyd v. Glass*, 34 Ga. 253; 89 Am. Dec. 252. A guardian of an intestate's children may be appointed by the orphans' court of the county in which administration on his estate is granted, although a guardian may have been previously appointed in another state: *Kraft v. Wickey*, 4 Gill & J. 332; 23 Am. Dec. 569.

HUDSON v. NORTHERN PACIFIC RAILWAY COMPANY.

[92 IOWA, 231.]

A WAIVER ON THE PART OF A RAILWAY CORPORATION of a stipulation in a contract to give notice in writing of a claim of injury to stock shipped by it before removing such stock from its place of destination and before mingling it with other stock may be inferred from its referring the claim to its claim department and subsequently requesting that a bill of the alleged damages be made out, and, after it was made out, offering to pay certain items thereof.

A FORFEITURE WILL BE DEEMED WAIVED by any agreement, declaration, or course of action on the part of him who is benefited by such forfeiture which leads the other party to believe that by conforming thereto, the forfeiture will not be incurred.

CONFLICT OF LAWS.—If a contract is made in a state, to be partly performed there, its validity is to be determined by the laws of that state.

LAWS OF ANOTHER STATE—PRESUMPTION.—In a state having no statutes upon a given subject, the common law will be presumed to be in force respecting it.

CARRIERS, LIMITING LIABILITY OF.—By the common law, a carrier may, by special contract, limit its liability as an insurer, but it cannot restrict it so as to excuse itself from loss or damages resulting from the negligence of its servants or agents. Hence, if a carrier of livestock allows the timbers of a bridge constituting a part of its road to become rotten, resulting in the breaking of a bridge and the delay of a train, it cannot escape liability for such delay by a stipulation in its contract of affreightment.

THE DAMAGES FOR DELAY IN THE TRANSPORTATION of cattle is the difference in their market value at the place of destination on the day when they were actually delivered there and the day when they ought to have been delivered.

EVIDENCE—MARKET VALUE.—Evidence of the market value of cattle in one place is admissible to prove their value in another, if it is shown that the market value at the former place is controlled by that at the latter, allowing the difference in freight.

EVIDENCE—MARKET VALUE.—A witness may be allowed to testify to values, though his opinions are based upon market reports and quotations.

Swan, Lawrence & Swan, for the appellant.

Joy, Call & Joy, for the appellee.

²³¹ DEEMER, J. On the thirteenth day of July, 1891, the plaintiff, through his agents, delivered to the ²³² defendant, at Genesee, Idaho, for shipment to Sioux City, Iowa, thirteen carloads of cattle, consigned to "Wyatt & Hopkins," for sale on the general market, for the account of plaintiff. The cattle were received by the defendant, and it undertook to transport them, as a common carrier, to their point of destination. They did not reach Sioux City until about midnight on the twenty-first, or early morning of the twenty-second, day of July. The plaintiff claims that the cattle were delayed on the way by reason of the negligence of the defendant, its agents and employes, for an unreasonable length of time, and that, by reason thereof, he was damaged in the shrinkage of the animals, decline in the market price, and in expense in caring for them during the delay, in the aggregate the sum of nineteen hundred and eighty-eight dollars and seventy-five cents. The defendant, while admitting the receipt of the cattle, alleges that it did so under a contract with Wyatt & Hopkins, which provided, among other things: "The said railroad company shall not be liable for the loss or death of, or for any injuries received by, any of such stock, unless the same is immediately caused by the willful misconduct or the actual negligence of the said company, or its agents, servants, or employes. The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of, or injury to, any of said stock, he will give notice in writing of his claim therefor to some officer of the said railroad company, or to its nearest station agent, before said stock has been removed from the said place of destination, and before such stock has been mingled with other stock." It provided further: "The shipper hereby assumes all risk of damage which may be sustained by reason of any delay in such transportation, not resulting from the willful negligence of the railroad company." It avers that this contract was entered into in Idaho, and that it was lawful under the ²³³ laws of that state, and binding upon the parties; that the alleged delay in the shipment of the cattle was not due to any want of care, or carelessness, on the part of the defendant, its agents or employes, but the damage, if any, caused by the delay, was assumed by the plaintiff, or occasioned by his carelessness and neglect. Defendant further says, in answer, that plaintiff

did not give the notice in writing of his claim for loss or injury, as provided by the contract. The plaintiff, in reply, admitted the making of the contract, but denies its validity, and further admits that he did not give the notice required by the contract of his loss and injury, but alleges that the defendant waived the same. On the issues thus joined, the case was tried to a jury, which returned a verdict for plaintiff, on which judgment was rendered, and defendant appeals. Although forty-one errors are assigned, defendant, in argument, discussed but few of them; and, under the well-known rules of this court, we will consider those only which are argued, the others being waived.

It is first urged that there was not sufficient testimony of waiver of the provisions of the contract requiring notice to be given the company by the plaintiff of loss or injury to his stock. This question is presented by the assignment of errors wherein it is claimed that the court erred in not giving to the jury the ninth instruction asked by defendant, to the effect that the proof introduced did not, as a matter of law, amount to a waiver. The court instructed the jury that the contract was binding upon the plaintiff, but that the defendant might waive its provisions, and gave them proper rules to determine what would constitute a waiver. This instruction was not properly excepted to, and the evidence adduced to support a waiver, except as to one particular item, was received without objection. There is no assignment in the record that the testimony does not support the waiver, except as ²³⁴ it arises upon the exception to the refusal of the court to give the instruction asked. We will assume, however, that the question is properly presented, and turn our attention to the question as to whether there was sufficient evidence to support the alleged waiver.

It appears from the testimony that after the receipt of the cattle, and some time early in August, plaintiff went to St. Paul, and saw Mr. Moore, the general freight agent of the defendant company. He was at that time the head of defendant's entire freight shipping business. Plaintiff related the facts of the case to him, and told him he had sustained a loss. Moore told plaintiff to make out a statement of his damages, or to go to Mr. Harrington, the general claim agent. Moore took plaintiff to Harrington, and told him he (plaintiff) had a claim against the company, and to have plaintiff make out a bill for his damages, and the loss he had sustained; and, if they found plaintiff entitled to any damages, they would adjust it at once. Plaintiff

made out a claim, and left it with the claim agent, at this interview. Afterward the claim agent wrote plaintiff the following letter (Exhibit 1):

"St. Paul, Minn., Nov. 20, 1891.

"Messrs. W. C. Hudson & Co., Sioux City, Iowa,

"Gentlemen: Referring to your claim of August 6, 1891, for one thousand nine hundred and eighty-eight dollars and seventy-five cents, I have investigated this matter thoroughly, and have laid the claim before our general freight agent, and also before our law department. The law department is of the opinion that we are in no wise liable for the amount of the claim. I am directed, however, by Mr. Moore, the general freight agent, to say to you that we will refund the extra expenses, account of feed, etc., at the time the delay occurred. Let me know if this is satisfactory. ²³⁵ Give me total amount of extra expenses thus incurred, and I will have check sent you at once.

"Yours truly,

"FRED HARRINGTON, F. C. A."

We are of opinion that these facts were sufficient evidence of a waiver on the part of the defendant, and of its right to insist upon the notice required by the contract, assuming it to be valid, to justify the court in submitting the question to the jury. Such forfeitures are not favored in law, and "courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted." Any agreement, declaration, or course of action on the part of him who is to be benefited by the contract, which leads the other party to believe that, by conforming thereto, the forfeiture will not be incurred, will, and ought to, estop the promisee from insisting on the forfeiture: *Insurance Co. v. Eggleston*, 96 U. S. 577; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141; 54 Am. Rep. 354. "Waiver is where one in possession of any right, whether conferred by law or contract, and of full knowledge of all the material facts, does, or forbears the doing of, something inconsistent with the existence of the right, and of his intention to rely upon it; and thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward": *Bishop on Contracts*, sec. 792. The provision in the contract in question was for the benefit of the defendant, and it might elect to rely on it or not, as it saw fit. If it so conducted itself as to evince an intention not to rely thereon, and induced the plaintiff to go to the trouble and expense of making out his claim for damage,

in accordance with the suggestion of its general freight agent, it is now estopped from insisting on the forfeiture: ²³⁶ Hollis v. State Ins. Co., 65 Iowa, 454; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Insurance Co. v. Norton, 96 U. S. 234.

In the case of Titus v. Glens Falls Ins. Co., 81 N. Y. 410, the court, in speaking of a waiver of forfeiture in insurance policies, says: "But it may be broadly asserted that if, in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act, or to incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel": Citing Allen v. Vermont etc. Ins. Co., 12 Vt. 366; Webster v. Phoenix Ins. Co., 36 Wis. 67; 17 Am. Rep. 479. See, also, Roby v. American Cent. Ins. Co., 120 N. Y. 510; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472; 23 Am. St. Rep. 62; Pennsylvania etc. Ins. Co. v. Kittle, 39 Mich. 51; Carpenter v. Continental Ins. Co., 61 Mich. 635. The same doctrine applies to waivers of forfeiture in leases (Taylor on Landlord and Tenant, 5th ed., secs. 287-749; 1 Smith's Leading Cases, 20, A), and to waivers of notice required by telegraph companies of claims for damage: Hill v. Western Union Tel. Co., 85 Ga. 425; 21 Am. St. Rep. 166; Western Union Tel. Co. v. Stratemeier, 6 Ind. App. 125; Western Union Tel. Co. v. Yopst (Ind., March 18, 1887), 11 N. E. Rep. 16; 20 N. E. Rep. 222. The case of Massengale v. Telegraph Co., 17 Mo. App. 257, does not announce a contrary rule. In that case the sender of the message was put to no trouble or expense at the request of the company. The general agent of the company merely promised to look into the matter. The fact that the waiver in this case was not made until after the time had expired for giving notice is not controlling, for the defendant's general agent treated the liability of the company as ²³⁷ still existing, and directed the plaintiff to go to the trouble and expense of filing his statement and claim for damages. At least, there was testimony authorizing the jury to so find. The claim agent, in refusing to pay the plaintiff's claim, did not put it on the ground that no notice had been given, but denied liability for the loss.

2. It is next urged that under the contract of shipment, which was made in Idaho, the plaintiff assumed all risks and damage in the shipment of the cattle not growing out of the willful negligence of the railroad company; that there is no statute

in Idaho making such contracts illegal, and, therefore, it is in full force and effect; and that there is no proof that the delay was due to the willful neglect of the company. The contract having been made in Idaho, to be partly performed there, its validity is to be determined by the laws of that state: *Talbott v. Merchants' etc. Transp. Co.*, 41 Iowa, 247; 20 Am. Rep. 589; *Fairchild v. Philadelphia etc. R.R. Co.* (Pa. April 18, 1892), 24 Atl. Rep. 79; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Hazel v. Chicago etc. Ry. Co.*, 82 Iowa, 477. As there is no statute in Idaho regulating such a contract, and as from the proofs it appears there have been no decisions upon the subject, we will presume the common law is in force there. Under the common law, a carrier may, by special contract, limit its liability as an insurer, as for the loss of goods by fire and other casualties which are not the result of its negligence; yet it cannot restrict it so as to excuse itself from loss or damage resulting from the negligence of its servants or agents: 3 Wood's Railway Law, 1885; *Railroad Co. v. Lockwood*, 17 Wall. 357; *York Co. v. Central R. R. Co.*, 3 Wall. 107; *New Jersey etc. Navigation Co. v. Merchants' Bank*, 6 How. 344; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Shriver v. Sioux City etc. Ry. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106. There was sufficient testimony to justify a finding by the jury ²³⁸ that the delay was due to the breaking down of a bridge on the defendant's line of way, near Spokane, in Washington, and that the bridge went down by reason of the negligence of the defendant, in allowing the timbers to become rotten, defective, and out of repair. The defendant could not, as we have shown, relieve itself from responsibility for damages occasioned by the delay if this delay resulted from its own negligence; and the stipulations in the contract of affreightment are no defense to this action.

3. After the discovery of the broken bridge at Spokane, the train which was carrying plaintiff's stock was unloaded at the town of Sprague, Idaho, and the cattle turned into defendant's stockyards at that place. It is claimed by plaintiff that these yards were too small; there was not sufficient room in which to feed and water the stock; that the watering trough was too small, the feed scarce, poor, and unfit for cattle; and that he was obliged to go outside and buy feed at his own expense; that, by reason of the condition of the yards and the lack of water and feed, the cattle shrunk in weight, and his damage was augmented. De-

defendant insists there is a lack of testimony to sustain these claims of the plaintiff. From a careful reading of the testimony, we are convinced there was sufficient evidence on these points to justify the verdict by the jury, if it were based upon these grounds. It is also contended by defendant that there is no evidence showing that the cattle were not transported within a reasonable time. With this contention we cannot agree, for, in our opinion, there was ample evidence on this proposition. It would serve no useful purpose to set it out in this opinion, which is already growing too long, and the parties must be content with our conclusion.

4. Plaintiff claims, as an element of damage, depreciation in the value of the cattle between the eighteenth day of July, when the cattle should have ²³⁹ arrived had the defendant been diligent, and the time when they did in fact arrive. Upon the arrival of the cattle in Sioux City, they were reshipped to, and sold, in South Omaha. When they reached South Omaha, about one-half of them were classified and sold as beef cattle, and the remainder as feeders. It was shown by the testimony that the market price of beef cattle at Sioux City, South Omaha, and Chicago was relatively the same, and that the Sioux City market was controlled by the Chicago and South Omaha markets, allowing the difference in freight. It was also shown that there was no market for feeders in Sioux City on the 21st of July. Witnesses were allowed, against defendant's objections, to state the market price of these cattle at Sioux City, South Omaha, and Chicago on the eighteenth day of July and on the twenty-first, and this is complained of as error. We think the rulings were correct. Of course, the ultimate question for the jury to determine, in case there was delay in the shipment, was the difference in the market value of the cattle at Sioux City, Iowa (the place of delivery), on the eighteenth and twenty-first days of July; but testimony as to the market price at South Omaha and Chicago on these days was proper to go to the jury, under the facts disclosed as evidence bearing upon the market price at Sioux City: *Lowell v. Commissioners*, 146 Mass. 403; *Cahen v. Platt*, 69 N. Y. 348; 25 Am. Rep. 203. Witnesses were allowed to testify as to values, who based their opinions upon market reports and quotations. Such a witness is competent to speak as to values: *Sisson v. Cleveland etc. R. R. Co.*, 14 Mich. 489; 90 Am. Dec. 252; *Peter v. Thickstun*, 51 Mich. 589; *Cleveland etc. R. R. Co. v. Perkins*, 17 Mich. 296.

We have endeavored, as best we may, to cover every point made in the defendant's argument, and our conclusion is, that there is no prejudicial error in the record; and the judgment is affirmed.

WAIVER OF FORFEITURE.—Any course of action on the part of an insurer which leads an insured honestly to believe that by conforming thereto a forfeiture will not be incurred, followed by due conformity on his part, estops the insurer from insisting upon a forfeiture, though it might be claimed under the express letter of the contract: *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637, and note. See, also, the note to *Home etc. Ins. Co. v. Kennedy*, 53 Am. St. Rep. 526.

CARRIERS—CONFLICT OF LAWS.—A contract made in one state, between a railroad company and a shipper, for the transportation of freight from a point in that state to a point in another state, and limiting the liability of the carrier, must be interpreted according to the law of the state where made: *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 568; 49 Am. St. Rep. 898. See especially the note to *O'Regan v. Cunard S. S. Co.*, 39 Am. St. Rep. 488.

CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier may, by contract, limit his common-law liability so far as is reasonable, but it is unreasonable to allow him to contract against his own negligence: *Davis v. Central Vermont R. R. Co.*, 66 Vt. 290; 44 Am. St. Rep. 852, and note. A common carrier may limit his liability by express contract, except as to gross negligence, fraud, or willful wrong of himself or his servants: *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 568; 49 Am. St. Rep. 898, and note. This subject is exhaustively treated in the extended notes to *Cole v. Goodwin*, 32 Am. Dec. 495-507, and *Bissell v. New York Cent. R. R. Co.*, 82 Am. Dec. 379, 380.

CARRIERS OF LIVESTOCK—NEGLIGENT DELAY.—THE MEASURE OF DAMAGES against a carrier of livestock for negligent delay in transportation and delivery is the difference in value of the animals at the time they should have been delivered in the condition they would have been at that time and their value when they were delivered in the condition they were at that time: *Richmond etc. R. R. Co. v. Trousdale*, 99 Ala. 389; 42 Am. St. Rep. 69, and note. See, also, the extended note to *Norris v. Savannah etc. Ry. Co.*, 11 Am. St. Rep. 366.

MARKET VALUE—EVIDENCE OF.—Where the value of personal property cannot be fixed by the proof of local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with proper allowance for cost of transportation and the hazard and expense incident thereto: *Jones v. St. Louis etc. Ry. Co.*, 53 Ark. 27; 22 Am. St. Rep. 175, and note.

WITNESSES—OPINION AS TO MARKET VALUE.—A witness who is purchasing wheat with reference to a particular market, is buying and selling in that market, and is kept informed as to the prices by circulars and correspondence is competent to testify as to the value of wheat in that market: *Brackett v. Edgerton*, 14 Minn. 174; 100 Am. Dec. 211; but a witness is incompetent to testify in North Carolina to market values at Boston, Massachusetts, when his knowledge is exclusively derived from market reports in a newspaper published in North Carolina: *Fairley v. Smith*, 87 N. C. 367; 42 Am. Rep. 522.

BETTS v. CHICAGO, ROCK ISLAND & PACIFIC RY. CO.

[92 IOWA, 343.]

A RAILWAY COMPANY SHIPPING LIVESTOCK MUST PROVIDE reasonably safe cars for the transportation of stock, and, when such a car is provided, and the stock is injured because of its viciousness or disposition to kick or otherwise so act as to injure itself or another animal, where the injury is not the result of neglect on the part of the company to properly care for the stock, the carrier is not liable.

CARRIERS OF LIVESTOCK.—A REASONABLY SAFE CAR is not one that will merely hold or confine the stock for transportation, but it must be a car reasonably safe for transporting the stock without injury from any cause that should be reasonably anticipated. Though the car is sufficient to confine the stock, yet it must be strong enough to resist the ordinary acts and usual conduct of such stock when carried on cars, such, for instance, as kicking, and if, through the weakness of the car and such acts, injury to the stock results, the carrier is answerable.

A CARRIER IS BOUND TO PROVIDE a reasonably safe car for the transportation of stock, having in view such conduct as is usual or ordinary for it, even though such conduct may be the result of its natural propensities, but, if such a car is provided, and the stock is injured because of its natural propensity to kick, the carrier is not liable.

EVIDENCE—OPINIONS AND CONCLUSIONS.—A witness who has had long experience in the shipping of livestock upon cars may be permitted to state whether, in his opinion, the bars in the car were sufficient and suitable to hold horses shipped therein.

Thomas S. Wright, Robert Mather, and Craig, McCrary & Craig, for the appellant.

J. F. Smith, for the appellees.

343 GRANGER, C. J. 1. Plaintiffs shipped from Des Moines to Keokuk, Iowa, on defendant's line of road, a carload of horses and mules. When the car reached its destination, it was found that some of the slats forming the sides and inclosure of the car had been broken, and that one horse and two mules were injured. Just how the injury occurred does not conclusively appear, but it is appellant's theory that it **344** was caused by the kicking of the animals, and such a conclusion has support in the evidence. The petition is in three counts, and appellant contends that it is apparent from the record that the findings for the plaintiffs are based on the averments of the third count, and that view may obtain in our consideration of the case. The grounds of recovery, as stated in the third count, are that the car "was unfit for the purposes of shipping stock, by reason of its weakness and unfitness." The following instructions are made a ground of complaint: "It was the duty of the defendant railway company to provide a suitable car and one of sufficient strength for the pur-

pose of shipping mules and horses; and if the defendant failed to do so, and, by reason of such failure or neglect, some of the animals shipped in said car were injured, the defendant is liable for the injury caused thereby to said animals. When a railway company undertakes to carry horses and mules, they are bound to furnish such cars as are strong enough to hold such animals from injuring themselves by reason of the weakness of such car; and if you find the car was broken in which the stock of plaintiff was shipped from Des Moines, and that same was broken by the ordinary acts and usual conduct of such stock when carried on cars on a railway, then, as to this issue, you will find for plaintiff." Defendant asked instructions embodying the rule that if the car was reasonably safe for the purpose of carrying stock, and that the "stock, by reason of fear, anger, excitement, or from any other cause in the nature of the animal to kick, did kick, and break holes in the sides of the car, whereby some of the legs of the animals were skinned, and they injured themselves from their own vicious natures, . . . without fault or negligence on the part of defendant," it would not be liable. Properly considered, we do not think there is an essential difference between the rule asked ³⁴⁵ and the one given. We understand the rule to be that the company must provide a reasonably safe car for the transportation of stock, and that when such a car is provided, and stock is injured because of its viciousness or disposition to kick or otherwise so act as to injure itself, or one animal injures another, where the injury is not a result of neglect on the part of the company to properly care for the stock, the company is not liable. This is the rule of *McCoy v. Railway Co.*, 44 Iowa, 424; *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa, 665. It is not, however, to be understood that a reasonably safe car is one that will merely hold or confine the stock for transportation, but it must be a car reasonably safe for transporting the stock without injury from any causes that should be reasonably anticipated. In *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa, 665, *McCoy v. Railway Co.*, 44 Iowa, 424, is referred to, and the rule is announced "that, when the cause of damage for which recompense is sought is connected with the character of propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier does not attach." Appellant relies on this rule, and insists that the company was not required to furnish a car in which the animals would not be injured by kicking, because the damage is the result of the character or propensities of

the animals to kick. That is giving to the rule, as announced, too broad a construction.

The facts of the cases in which the rule has been announced indicate very fairly its intended scope. It is surely not to be thought that if a car is so constructed that stock, from its natural disposition to crowd, should be injured because of a manifestly faulty construction of the sides of a car, the company would not be liable. Such a rule would not be contended for; and it will be conceded, we think, that the company, in the construction of its cars for such a purpose, must have in mind that stock so confined is likely to crowd and be forced ³⁴⁶ against the sides of a car, and it must so construct its cars as to avoid unnecessary injury. If this is correct, the literal application of the rule as claimed by appellant cannot obtain, and it certainly should not. Horses and mules, when thus confined, may not be as likely to kick as to crowd, but we cannot say that it is unusual for them to both crowd and kick, at least to some extent. We do not think that a car, the sides of which are so constructed that a slight kick from a horse or mule would break them, would be sufficient for such shipments. It is not for us to determine what would be a reasonably safe car for such purposes, because it is a question of fact, or, at least, it is generally so. The superior court only permitted a recovery if the car "was broken by the ordinary acts and usual conduct of such stock when crowded on cars on a railway." It also told the jury that "if, from the whole case, you find that defendants used due care, and furnished a suitable car for the purpose of shipping horses and mules, and that the injury was caused by the natural propensities of the said animals," the plaintiffs could not recover. We think the rule of the instructions, somewhat concisely stated, is that the company was bound to provide a reasonably safe car for the transportation of such stock, having in view such conduct as is usual or ordinary for it, even though such conduct might be the result of the natural propensities of such stock, and that the company was liable for damages resulting from a neglect to do so; but that if such a car was provided, and the stock was injured because of its natural propensity to kick or otherwise act, there could be no recovery. Of such a rule appellant has no just ground of complaint.

2. One of the plaintiffs, after stating that he was familiar with the shipping of stock in stock-cars, that ³⁴⁷ he had been shipping about nine years, and had experience as to what cars would hold stock and what would not, was asked: "State whether or not the

bars in that car were sufficient and suitable to hold horses." And he answered, against objections, that they were not. It is urged that it was error to permit the answer. We do not think so. The claim is that it was stating a conclusion, so as to bring it within the rule of *Curl v. Chicago etc. Ry. Co.*, 63 Iowa, 417, *Barnes v. Newton*, 46 Iowa, 567, and *Spears v. Mt. Ayr*, 66 Iowa, 721. In two of the cited cases it was held that it was not competent for a witness to state a conclusion as to whether or not a sidewalk was dangerous, but that the facts should be stated, and leave the conclusion to the jury. In the other case, an important issue was as to whether or not a conductor allowed a passenger reasonable time in which to pay his fare before ejecting him from the car; and it was held that the conductor, as a witness, could not state the conclusion that he did give such time. In those cases, when the facts were stated, the jury could as well find the conclusion as the witness could form one from his knowledge of the facts; for, with the facts known, no particular experience, skill, or knowledge was necessary to reach the conclusion. But the character of a car that will meet the requirements for shipping stock is to be known from experience or observation as to what will meet the test. To reach such a conclusion, one should have knowledge of the usual habits of stock when confined in cars, and what kind of cars have, and have not, proved sufficient for such purposes.

We think there was no error in the ruling of the court. There are no other assignments so argued as to authorize their consideration. The judgment is affirmed.

CARRIERS OF LIVESTOCK—DUTY TO FURNISH SAFE CARS.—A railroad company undertaking to transport livestock is bound to furnish safe and suitable cars and is responsible for any loss arising from a neglect of duty in this particular; *Peters v. New Orleans etc. R. R. Co.*, 16 La. Ann. 222; 79 Am. Dec. 578; *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 531; 90 Am. Dec. 166; but a carrier of livestock is not required to have vehicles strong enough to withstand the struggles of unruly and vicious stock. It is sufficient for the carrier to furnish cars suitable for the safe conveyance of ordinary animals of the class contracted to be conveyed; *Selby v. Wilmington etc. Ry. Co.*, 113 N. C. 588; 37 Am. St. Rep. 635, and note with the cases collected. See the full discussion of this subject in the extended notes to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208, and *Kansas Pac. Ry. v. Nichols*, 12 Am. Rep. 500.

WITNESSES—OPINIONS.—Witnesses who have been for years engaged in shipping animals, who know their habits and the causes likely to lead to their injury while on cars, and who saw the injured animals when they are unloaded, are competent to express an opinion as to the causes of their injury; *Schaeffer v. Philadelphia etc. R. R.*, 168 Pa. St. 209; 47 Am. St. Rep. 884.

DOOLITTLE v. SHAW.

[92 IOWA, 348.]

CONVERSION, WHEN DOES NOT RESULT FROM THE USE OF PROPERTY IN VIOLATION OF A CONTRACT.—If a person merely uses the property of another in a manner and for a purpose not authorized by the contract under which he obtained possession of it, but without destroying it or intending to injure or impair the residuary interest of the bailor, such misuse does not determine the bailment, and therefore is not a conversion for which trover will lie.

CONVERSION.—THE HIRER OF A TEAM to drive from one place to another and return does not, by merely driving it beyond such place, become guilty of its conversion, there being no exercise of dominion over it in repudiation of, or inconsistent with, the owner's rights.

SUNDAY LAWS.—If the hirer of a team converts it to his own use, he is liable therefor, though the hiring was upon a Sunday. His act of conversion is not based upon, but is independent of, the contract.

A. A. House, for the appellant.

348 KINNE, J. Plaintiff's cause of action is stated in two counts. The first charges that on September 1, 1892, defendant had and received from the plaintiff a pair of horses and buggy, of the value of two hundred and fifty dollars, to drive from Delhi, Iowa, to Manchester, Iowa; that defendant drove said horses so immoderately, and so neglected their care, that one of them became sick, and defendant, knowing said fact, continued to drive and abuse said horse until his death; that plaintiffs were damaged in the sum of one hundred dollars. In a second count, plaintiffs aver that they paid two dollars, at defendant's instance, to have the horse buried. In an amendment it is averred that the team and buggy were loaned to defendant to go from Delhi to Manchester and return, and that defendant, after driving to Manchester, converted said team and buggy to his own use, and failed to return said team as received, and still fails to return one of said horses, **349** which horse was worth one hundred dollars, for which they pray judgment. Defendant denied all of the allegations of the original petition. Afterward, in an amendment, he pleaded that the contract of letting and hiring set out in the petition, and the damage growing out of the same, and all matters set out in the amendment, occurred on Sunday, and no right of action can be maintained thereon. There was a trial to a jury, and a verdict for plaintiffs.

2. On Sunday, September 4, 1892, defendant hired of plaintiffs a team of horses and a buggy to drive from Delhi to Manchester and return. After arriving at Manchester, he drove six or seven miles into the country. He then returned to Manches-

ter, where he let one Luke Connelly drive the team to the fair ground and back, after which defendant and Connelly started on the return trip to Delhi, and, when about midway between the two places, one of the horses was taken sick and died. At the close of plaintiff's testimony, defendant moved for a verdict, which motion was overruled. The grounds of the motion were: 1. That the testimony showed a letting of the team on Sunday, and plaintiffs did not bring themselves within the exceptions of the statute prohibiting work on that day; 2. That it was not shown that the death of the horse was caused by driving to a place other or different from the place where it is alleged the horses were let to be driven; and 3. No negligence or misconduct of the defendant is shown in the management or driving of said horse. We need not consider the ruling on this motion, as the questions therein presented are also raised in the further progress of the trial. In the seventh and eighth instructions given by the court to the jury, they were told, in substance, that if defendant hired the team, and drove them so immoderately, and was so negligent in caring for them, that one of them became sick, and defendant, with knowledge of such ³⁵⁰ sickness, continued to drive and abuse the horse until it died, and if such treatment was such as an ordinarily prudent man would not give such horse under like circumstances, and if the contract of hiring was made on Sunday, they should find for the defendant. No complaint is made of these instructions, and, whether right or wrong, they are to be treated as the law of the case, so far as the cause of action stated in the first count is concerned. The case, then, is to be considered, so far as legal errors are concerned, with reference to the cause of action for the conversion of the horse.

3. The court gave the jury the following instruction: "9. If you find from the evidence that the team was hired or given to defendant only for the purpose of driving from Delhi to Manchester, and that, being so hired, defendant,, without the consent of plaintiffs, drove some miles away from the line of travel between said towns, to a place not contemplated by the contract of hire, then such use of the team would be a conversion of the same by the defendant, and the plaintiffs might elect to recover the value of any part of such team and buggy as was not returned to and accepted by them after knowledge of such conversion; and plaintiffs would have a right to recover, if you find such to be the fact, even though the evidence disclosed that the contract of hire by which defendant secured possession of the

property was made on Sunday." The instruction lays down the broad rule that a mere diversion from the line of travel, or going beyond the point for which the horse was hired, will, without more, amount to a conversion of the animal, for which an action will lie. What will amount to a conversion in such cases is the question we must determine.

In *Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514, the court defined a conversion as follows: "Conversion is based upon the idea of an assumption by the defendant ³⁵¹ of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner; and it is, therefore, not every wrongful intermeddling with, or wrongful asportation, or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even though the defendant may have honestly mistaken his rights; but acts which do not themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion": *Evans v. Mason*, 64 N. H. 98. In *Story on Bailments*, section 413 a, after stating the rule as to what is a conversion in such cases, it is said: "But, although this is the general rule, a question may arise how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred, even if he had not been guilty of any such misconduct, negligence, or deviation from duty." He, also, in the same connection, says: "The question, therefore, in the present state of the authorities, must still be deemed open to controversy. Wherever it is discussed it will deserve consideration, whether there is, or ought to be, any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there is merely some negligence or omission or violation of duty in regard to it, not conducing to the loss." *Schouler on Bailments*, page 137, referring to this same matter, says: "It is not difficult to conceive that the ³⁵² technical misuse might occur without an actual abuse of the terms of hire, and where it would be harsh to visit deviation with such disastrous penalties."

We are not willing to give our sanction to the broad, and, when

applied to a case like that at bar, harsh rule of the instruction. It must be borne in mind that, in almost every case where that strict rule has been applied, the facts have shown that the hirer, in addition to departing from the contract line of travel, was guilty of negligence or of willful misconduct, or that he injured or destroyed the property while outside of the limits of the contract of hiring: Schouler on Bailments, 137; Farkas v. Powell, 86 Ga. 800. In the case last cited, the action was for the value of a horse which had died, and which it was alleged defendant had ridden beyond the place he had hired him to go, and that, by negligence or cruelty, the horse had been so injured as to cause his death. The horse was hired to ride from Albany to the Whitehead place, in the country, a distance of five miles, and was to be returned by 11 o'clock at night. When defendant arrived at the Whitehead place, he learned that the person he wished to see was at the Bryant place, three or four miles further on, and he rode on to that place. He remained there two hours and a half, and left about 9:30 P. M. for Albany. On the return, and between the Whitehead place and Albany, the horse fell in the road. He got the horse up on his feet, and led him three miles, when he again fell. After getting him on his feet again, he put him in a lot near by, and went into town, and notified the plaintiff where the horse was, and of his condition. The horse died. It appeared that, when defendant got the horse to go upon his journey, he was sound and in good condition, and showed no signs of disease. The defendant showed that he rode the animal moderately. It was held that there was a technical conversion ³⁵³ of the horse, and, if the horse had been injured while beyond the point to which he was hired to go, defendant would have been liable, whether the injury was caused by his own negligence, or by the negligence of others, or even by accident, unless he was forced to go beyond that point by reason of circumstances he could not control.

The court said: "But the main question in this case is, Would Powell, after having been guilty of a technical conversion or violation of his duty, and having returned within the limits of the original hiring, and the horse then sustained an injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. . . . If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if

guilty of no other fault." In *Harvey v. Epes*, 12 Gratt. 153, the contract was one for the hire of slaves for a year, to work in a certain county. They were taken by the hirer, without the owner's consent, to another county, and employed in the same kind of work, and, while there, died. The court, after elaborately discussing the question and fully considering the authorities, held that the removal of the slaves to a county other than that for which they were hired to work in was not of itself a conversion, regardless of whether their death was caused by such wrongful act or not. It said: "Upon the whole, I am of opinion that, in the case of a bailment for hire for a certain term, . . . the use of the property by the hirer, during the term, for a different purpose, or in a different manner, from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction ³⁵⁴ of the property be thereby occasioned, or at least unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. . . . A bailment upon hire is not conditional in its nature, any more than any other contract; and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms of the bailment. . . . If he merely uses the property in a manner, or for a purpose, not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein, such misuse does not determine the bailment, and, therefore, is not a conversion for which trover will lie": See, also, 2 *Parsons on Contracts*, 128. In *Cullen v. Lord*, 39 Iowa, 302, the action was for the recovery of the value of a horse loaned to defendant, and which it was averred was killed by the defendant's overdriving and ill-treatment. It was held that the jury should have been instructed that, in the absence of a contract to the contrary, the law implied an agreement to pay for the use of the horse. The evidence tended to show that plaintiff gave defendant certain instructions and directions respecting the time of starting, and the manner of caring for the horse. An instruction of the lower court to the effect that, if plaintiff gave instructions and directions, and did not afterward waive them, and defendant did not follow them, he would be liable, without inquiry as to whether the injury resulted from a failure to obey the instructions or from some other cause, was held erroneous as applied to a case of letting for a reward. While the facts in that case, so far as they appear, are not like those in the case at bar,

still we think there is a clear recognition of the doctrine that, in cases of a letting for reward, a mere violation of the contract, without more, will not fix a liability as for a conversion. To constitute a conversion in a case ³⁵⁵ like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going beyond the point for which the horse was hired, are acts which, in and of themselves, do not necessarily imply an assertion of title or right of dominion over the property, inconsistent with, or in defiance of, the bailor's interest therein.

As there was nothing to show that the defendant, in violating the terms of the contract, intended to appropriate the property temporarily or permanently to his own use, or that he did in fact so appropriate it, or exercise acts of dominion over it inconsistent with plaintiffs' rights, he should not be held liable for its value from the mere fact that he drove the horse beyond or outside of the journey for which he was hired. Nor do we see that the rule we have stated is fraught with danger in its application to other cases that may arise. We are not called upon to determine as to whether or not the defendant would have been liable if, under proper issues and evidence, it had been shown that the extra driving caused or contributed to the death of the horse, as no such case is presented. As to the fact that the contract was entered into on Sunday, we do not think it is at all controlling. The action is not based upon the contract, but upon the theory that defendant converted the property to his own use. If he did so, he was not acting under the contract, but independent of it. We discover no error in the eleventh instruction.

For the reasons given, the case is reversed.

CONVERSION—WHAT CONSTITUTES.—To constitute a conversion, there must be a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or a withholding of the possession under a claim of title inconsistent with that of the owner: *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87, and note. Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent therewith is and may be treated as a conversion: *Carpenter v. American Building etc. Assn.*, 54 Minn. 403; 40 Am. St. Rep. 345, and note. A conversion is any unauthorized act which deprives a man of his property permanently or for an indefinite time: *Union Stock Yard etc. Co. v. Mallory*, 157 Ill. 554; 48 Am. St. Rep. 341, and note. See, also, the extended notes to *Bolling v. Kirby*, 24 Am. St. Rep. 795, and *Hale v. Ames*, 15 Am. Dec. 151.

CONVERSION BY BAILEE OF HORSE.—A bailee of a horse for hire is liable in an action for trover when he hires him to be driven to one place and drives him to another without the consent of the

owner: *Malaney v. Taft*, 60 Vt. 571; 6 Am. St. Rep. 135, and note; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310. See, also, the notes to *De Tollenere v. Fuller*, 12 Am. Dec. 621, and *Bulling v. Kirby*, 24 Am. St. Rep. 815.

NELSON v. HANSON.

[92 Iowa, 356.]

STATUTE OF LIMITATIONS.—NEW PROMISE OR ACKNOWLEDGMENT.—If the maker of a note, in response to a letter from the holder asking whether he intends to settle the note held against him by the writer, answers that he will pay what he can and what is right, such answer is not sufficiently clear and unqualified as to constitute a new promise or admission of indebtedness.

Leggett & McKerney, for the appellant.

W. G. Ross, for the appellee.

356 ROBINSON, J. The facts admitted by the demurrer are substantially as follows: On the second day of January, 1877, the defendant made and delivered to the plaintiff, in this state, her promissory note in writing for the sum of three hundred and thirty-six dollars and eighty cents, payable on demand, with interest thereon at the rate of ten per cent per annum. A payment of fifty dollars was indorsed thereon August 4, 1883, and another of ten dollars on the first day of January, 1884. On the first day of August, 1892, the plaintiff wrote to the defendant concerning the note as follows: "Please let me know if you intend to settle with me about that note I hold against you." On the next day she answered in writing, referring to the note as follows: "I received your letter . . . **357** Will come up after harvest, and the note, you know that I will pay what I can, and what is right. "C. HANSON."

The grounds of the demurrer are, that the note is barred by the statute of limitations, and that the letters do not identify the note in suit as the one to which they refer, and that the one signed by the defendant is not sufficiently clear and unqualified to constitute a promise to pay the note, or an admission of indebtedness. Section 2539 of the code is as follows: "Causes of action founded on contract are revived by an admission that the debt is unpaid as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby." It is not necessary, in order to revive a cause of action under this provision, that there be both an admission that the debt is unpaid and a new promise to pay it, but

either is sufficient: *Stewart v. McFarland*, 84 Iowa, 56, and cases therein cited. It is not essential to a revival of the cause of action that the admission be couched in precise and direct terms, but it is sufficient if it show with reasonable certainty that the debt is unpaid: *Penley v. Waterhouse*, 3 Iowa, 441; *Manchester v. Braedner*, 107 N. Y. 346; 1 Am. St. Rep. 829. A statement in the mortgage that the premises thereby encumbered were "already subject to a mortgage" in the hands of persons named is a sufficient admission that the debt secured by the paramount mortgage is unpaid: *Palmer v. Butler*, 36 Iowa, 581. Promises by the debtor to pay a claim "as soon as possible," or "as soon as he could," and others of a similar character, have been held sufficient as admissions of the debt: *Norton v. Shepard*, 48 Conn. 141; 40 Am. Rep. 157; *Butterfield v. Jacobs*, 15 N. H. 140; *First Congregational Soc. v. Miller*, 15 N. H. 520; *Custy v. Donlan*, 159 Mass. 245; 38 Am. St. Rep. 419; *Chidsey v. Powell*, 91 Mo. 625; 60 Am. Rep. 267; *Devereaux v. Henry*, 16 Neb. 55; *Hartranft's* ³⁵⁸ Estate, 153 Pa. St. 530; 34 Am. St. Rep. 717; *Barnard v. Bartholomew*, 22 Pick. 291; *Cummings v. Gassett*, 19 Vt. 308; *Walsh v. Mayer*, 111 U. S. 31. In *Wise v. Adair*, 50 Iowa, 104, the debtor wrote to the creditor as follows: "How will it suit you to make three notes of the amount due you?" describing the proposed notes, and the letter was held to be a sufficient admission of indebtedness, to the amount of the notes specified, to revive the debt.

In *Bayliss v. Street*, 51 Iowa, 627, the expressions: "I am sorry I cannot pay you now. I had expected to pay you this fall, but, owing to scarcity of money, I cannot. It is a long weary time I have been paying those debts, and am not through yet. I hope to live to pay you, and hope to do so next spring. But I have provided, in case I die before you are paid, my wife will pay you out of an insurance on my life"—were held sufficient to remove the bar of the statute. In *Miller v. Beardsley*, 81 Iowa, 721, it appeared that the debtor had written to the creditor concerning the debt as follows: "On Saturday, the twenty-seventh inst, I paid S. S. Wilcox interest on nine thousand dollars, which you have received probably before this time, part of which was not due. Mr. Wilcox figured the interest out that was not due, saying he did not know how you would like it. If that does not meet with your approval, we will fix it some other way. I had the money, and thought you could use it, and probably it would not make any difference, as I had to get exchange on New York to get it all at one time. The small note I did not pay, as I

shall be at considerable expense this summer on my last purchase of De Forest." This was held to be a sufficient admission to revive the debt. But in all these cases the language used by the debtor was an unqualified admission of indebtedness, either in words or in legal effect, while in this case the language ³⁵⁰ of the admission is, "The note, you know that I will pay what I can and what is right." This must be construed as a single statement. It cannot be given the effect of a promise to pay what the promisor could pay. The first part of the statement is qualified by the words, "and what is right." The statement was, in effect, that the defendant would pay all that it was right for her to pay if she could do so. She did not indicate what part of the claim, if any, it was right for her to pay, and her opinion in regard to that is a matter for conjecture only. In *Stewart v. McFarland*, 84 Iowa, 56, it appears that a person deceased had, in his will, recognized the existence of the note on which the action was founded, by offering to the holder a sum less than the amount which appeared to be due thereon in full payment. This court held that the will did not admit that the decedent justly owed the amount of the note, and the demand for an allowance of that amount was refused. In *Stout v. Marshall*, 75 Iowa, 498, the admission relied upon by the plaintiff was made by defendants in words as follows: "Ira Smith is here, and spoke to me in regard to our settlement of those old notes. I have no money now, but you shall have every cent that is due on them." This court held the admission not sufficient to revive the debt as to one of the notes held by the plaintiff when the admission was made. Although that referred to more than one note, and the admission in this case refers to but one, yet we think the two cases are governed by a common rule, and that the admission in each was too indefinite and too uncertain to revive a cause of action: See *Chambers v. Garland*, 3 G. Greene, 325; *Horner v. Starkey*, 27 Ill. 13; *Burr v. Burr*, 26 Pa. St. 284; *Denny v. Marrett*, 29 Minn. 361; 13 Am. & Eng. Ency. of Law, 748.

We conclude that the demurrer was properly sustained, and the judgment of the district court is affirmed.

LIMITATIONS OF ACTIONS—NEW PROMISE.—An acknowledgment sufficient to remove the bar of the statute of limitations, must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained and an express or implied promise to pay it: *Ward v. Jack*, 172 Pa. St. 416; 51 Am. St. Rep. 744, and note.

NOYES v. COLLINS.

[92 IOWA, 566.]

ACCRETION—THE OWNER OF LANDS FRONTING on an unnavigable lake does not acquire title to the lands within the lake or any part thereof upon the recession of the waters from a river cutting into the lake and draining it.

LAKES AND PONDS, OWNERSHIP OF LANDS BENEATH. Owners of lands bordering upon lakes and ponds do not, in Iowa, take title to the thread of the stream. If the government meanders such a lake and conveys the adjacent uplands, no title passes to any part of the bed of the lake.

Jesse T. Davis, for the appellant.

S. H. Cochran, for the appellee.

567 GRANGER, C. J. 1. The plaintiff is the owner of lot No. 6, section 15, township 80, range 45, west of the fifth principal meridian in Harrison county. Section 15 is a part of the swamp land grant from the United States to the state of Iowa, and from the state to Harrison county. The lot was conveyed by the county to one Morgaridge, and, after mesne conveyances, the title vested in the plaintiff. What was known as "Dry Lake" was in part on section 15, and was a body of water from five to seven miles in length, and from eighty to one hundred rods in width. Its depth was from three to seven feet. The boundaries of lot number 6 in the deeds of conveyance are as follows: "Commencing at the southeast corner of sec. 15, twp. 80, R. 45, and running to Dry Lake, thence southwest, by the meanders of said Dry Lake, to the south line of section 15, thence east along said line to the place of beginning—containing thirteen acres, more or less." Because of ditches made by Harrison county, and the action of the Missouri river in washing away its banks, and of its waters spreading into Dry Lake and depositing large quantities of earth, the lake, about 1881, ceased to be. What was the bed of the lake has been, by the county, divided into lots and sold, and the defendant owns, in pursuance of such a sale, lot No. 7. It is appellant's claim that, as Dry Lake was an unnavigable body of water, he takes, by the conveyance to him, to the center thread of it, which would include what is now lot No. 7; and this action is for its possession. If appellant's claim is sustained, instead of about thirteen acres, as described in his deed, he gets some twenty-three or twenty-four acres of land. Some claim is made by appellant in argument that he is entitled to this additional land under the law of accretions. To **568** our minds, such law has no application to the facts. It is not a case

of increase to the land by gradual deposits of soil through natural causes, but by both natural and artificial causes the lake was both drained and filled. Nor is it a case where there was such gradual recession of the water that the doctrine of reliction applies. It appears from the testimony that the ditch made by the county drained the lake to some extent at one end, and it seems that in 1881 the "Missouri river cut into the lake and drained the same." It is said in evidence: "The water all disappeared in the lake in 1881." The rule is, in order to entitle the adjoining property holders to the right of possession of land left bare by receding water, that the recession must be gradual, slow, and imperceptible. In case of a sudden and sensible recession of the water, the ownership of the land will not be changed: *Warren v. Chambers*, 25 Ark. 120; 91 Am. Dec. 538; 4 Am. Rep. 23; *Murry v. Sermon*, 1 Hawks, 56; *Boorman v. Sunnuchs*, 42 Wis. 233; *Gill v. Lydick*, 40 Neb. 508. In this case, it appears that the disappearance of the water from the lake was sudden and not in a way to change the title to the bed of it.

2. It may be conceded as the rule that riparian owners of lands bordering on rivers or streams not navigable, in the absence of a limitation in the title, take to the center thread of the river or stream. A case of such limitation of title is found in *Murphy v. Copeland*, 58 Iowa, 409; 43 Am. Rep. 118. In this state no such rule has been applied to lakes or ponds. "Dry Lake," as it was called, was meandered by the government surveyors, and nothing in the record indicates that in any of the conveyances of lot No. 6 there was any purpose to include a part of the bed of the lake. No such claim is made, further than the acts of the parties would be affected by the rule of law as to such riparian owners. In *Diedrich v. Northwestern etc. Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399, it is said: "The rule that the title of the ⁵⁶⁹ riparian owner upon a natural lake or pond does not extend beyond the natural shore appears to be very generally—almost universally—recognized." Our views are in accord with the doctrine thus announced. It is not only in harmony with general adjudications on the subject, but it seems, in view of the particular facts of this case, equitable.

The judgment of the district court is affirmed.

WATERS—ACCRETIONS—LANDS UNDER LAKES.—If accretions come to riparian proprietors of lands bounded by meandered lakes, they take to the water's edge and follow the gradual recession of the waters to their edge, but if a large body of land is suddenly and perceptibly formed by reliction, it belongs to the state: *Fuller v. Shedd*, 16 Ill. 462; 52 Am. St. Rep. 380. By the common law, the

same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still waters. Hence, if a meandered lake is nonnavigable in fact, the patentee of land bordering thereon takes to the middle of the lake, while, if the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity and the riparian patentee takes the fee to the water's edge only: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541. A grant of land on a small inland lake extends to its center: *Gouverneur v. National Ice Co.*, 134 N. Y. 355; 30 Am. St. Rep. 669, and note. This question will be found further discussed in the extended notes to *Miller v. Mendenhall*, 19 Am. St. Rep. 231, and *Coulthard v. Stevens*, 35 Am. St. Rep. 308, 309.

GRIFFITH v. MILWAUKEE HARVESTER COMPANY.

[92 IOWA, 634.]

AN ATTACHMENT IS NOT VOID BECAUSE THE BOND given for its issue is for a smaller sum than is required by the statute.

JURISDICTION OVER NONRESIDENTS.—A personal judgment cannot be rendered against a nonresident who has not been served with process within the state.

JUDGMENT IN REM, WHAT IS.—A judgment that the plaintiff may have and recover against the defendant a sum, naming it, and that the property attached, describing it, be sold to satisfy such judgment, and that a special execution issue for the sale thereof, is a judgment in rem.

A JUDGMENT IS NOT VOID because rendered against a defendant at a term of court next before that in which the plaintiff was entitled to have it rendered.

JURISDICTION, DEFECTS IN ACQUIRING.—Where there has been a service of a required notice, and the proper court has determined that the service was sufficient, the subsequent proceedings based thereon are not void, but, at most, voidable on proper application. The failure to serve notice twenty days before the first day of the term at which judgment is rendered does not make it void.

JUDGMENTS.—A MISTAKE IN STATING THE NAME OF A CORPORATION PLAINTIFF in the title in the complaint does not vitiate a judgment, where such name is correctly stated in the body of the complaint, in the original notice, and in the writ of attachment.

EXECUTION SALES.—A MISTAKE IN THE NAME OF THE PLAINTIFF in the execution and notice of sale does not avoid such sale, where the judgment is otherwise correctly described.

AN EXECUTION SALE WILL NOT BE SET ASIDE because of inadequacy of price, though very great, where it was made subject to redemption, and the sale was conducted in all respects according to law.

EXECUTION SALE—EQUITABLE RELIEF.—A court of equity will not relieve a defendant from an execution sale, though the price realized was grossly inadequate and he did not know of the sale when it was made, if he did know that he had been sued, and that an attachment had issued against his property, and he exercised no diligence to ascertain what had been done in the cause or to make any redemption from the sale.

T. F. Ward, for the appellants.

O. H. Montzheimer and Wesley Martin, for the appellee.

⁶³⁵ ROBINSON, J. On the thirteenth day of February, 1891, a petition which was entitled "The Milwaukee Harvesting Company, Plaintiff, v. D. Griffith et al., Defendants," was filed in the district court of O'Brien county. The petition sought a recovery on two judgments alleged to have been rendered against Griffith, who is the plaintiff in this action, and asked a writ of attachment against his property. Judgment was demanded for the sum of one hundred and thirty-two ⁶³⁶ dollars and twenty-three cents, with interest thereon at the rate of eight per cent per annum from the fifteenth day of December, 1890, and costs. An attachment bond in the penal sum of two hundred and seventy-five dollars was filed, and a writ was issued and levied upon the northeast quarter of section 8, in township 96 north, of range 40 west, then owned by Griffith. On the fourteenth day of February, 1891, a notice of the action was served upon Griffith, personally, in the state of Wisconsin. He was then, and at all times since has been, a resident of that state. He made no appearance in the action, and on the third day of March judgment was rendered against him for the sum of one hundred and thirty-four dollars and fifty-two cents, with interest at eight per cent, and costs, taxed at eleven dollars and ninety-five cents. A special execution was issued for the sale of the lands described. The land was sold on the eighteenth day of April, 1891, to the defendant T. F. Ward, and, on the twentieth day of April, 1892, the sheriff executed a deed to him pursuant to the sale. The land, when sold, was of the value of about three thousand dollars, and was encumbered by a mortgage to the amount of five hundred dollars. The sale was made subject to that mortgage for the sum of one hundred and sixty-nine dollars and twenty cents. Griffith did not know of the sale until after the sheriff's deed had been delivered, although notice of the levy and sale was addressed to him at the postoffice where he regularly received his mail, and mailed. At the time of the sale no one was living upon or in actual occupation of the land, but it was cultivated by a tenant who lived on an adjoining farm. After receiving the deed, Ward executed a conveyance of the land to the defendant K. Hughes. This action was commenced on the fifth day of May, 1892. The plaintiff asks that the sheriff's sale and deed be set aside and declared void, that the judgment be set aside, and that he be ⁶³⁷ permitted to defend in the action against him. The dis-

strict court granted the relief thus demanded. The defendant, the Milwaukee Harvester Company, was permitted to amend its petition in the cause in which judgment was rendered, and to file a sufficient bond.

1. It is claimed that the attachment proceedings were invalid because of the failure of the Milwaukee Harvester Company to file a sufficient bond. Section 2959 of the code provides that "in all cases before an attachment can be issued the plaintiff must file with the clerk a bond for the use of the defendant . . . in a penalty at least double the value of the property sought to be attached." Section 2954 of the code requires the sheriff to levy a writ of attachment "upon property fifty per cent greater in value" than the amount stated in the petition, under oath, to be due. Under these provisions, the amount for which the bond in question should have been given was three times the sum alleged in the petition to be due, or for not less than four hundred and three dollars and fifty-six cents. It is not within the discretion of the court to permit the filing of a bond for a smaller amount than that required by the statute, and upon a proper motion an attachment will be dissolved for failure to file a bond in the necessary amount: *Churchill v. Fulliam*, 8 Iowa, 47; *Hamill v. Phenicie*, 9 Iowa, 526; *Fleitas v. Cockrem*, 101 U. S. 301; *Waples on Attachment*, 116. Section 3018 of the code authorizes the discharge of an attachment on motion at any time before the trial for insufficiency of statement of cause of attachment or for other reasons making it apparent of record that the attachment should not have issued. But section 3021 of the same chapter contains the following: "This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall be ⁶³⁸ quashed, dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings." One of the evident purposes of this section is to prevent the loss to the plaintiff, by reason of defects in the proceedings which he is able and willing to cure, of the benefits he would derive from the attachment, and to give him a reasonable opportunity to make the necessary corrections. A sufficient bond may be given in lieu of a defective one, and when that is done the new bond will be treated as security from the time the first one was given:

Branch etc. Bank v. Morris, 13 Iowa, 136. But until objection is made, and until a reasonable opportunity has been given to the plaintiff to perfect proceedings in which there are curable defects, such proceedings will be treated as valid: See State v. Foster, 10 Iowa, 436. In the case in question, it does not appear that the defect in the bond was the result of any intent on the part of the plaintiff to evade the requirements of the statute. The fact that Griffith was a nonresident, and served with notice outside of the state, does not make the case an exception to the general rule. Provision is made for the service of notice of an action aided by attachment on nonresidents, by publication, to confer upon the court jurisdiction to render judgment against the attached property: Code, sec. 2618. The actual service of notice on Griffith in Wisconsin was a substitute for service by publication: Code, sec. 2621. We are of the opinion that the defect in the bond did not prevent the acquiring of a lien on the land in question.

2. No valid personal judgment can be rendered by a court of this state against a defendant, who has been served by publication only, who has not made an ⁶³⁹ appearance. As personal service on a nonresident, made outside the state, is only a substitute for service by publication, no personal judgment can be rendered against a nonresident so served who has not made an appearance: Bates v. Chicago etc. Ry. Co., 19 Iowa, 261; Darrance v. Preston, 18 Iowa, 399; Smith v. Griffin, 59 Iowa, 410, and cases therein cited. It is insisted that the judgment rendered against Griffith was personal, and not against the attached land, and therefore that it is void. The judgment is "that said plaintiff have and recover judgment against the defendant, D. Griffith, in the sum of one hundred and thirty-four and 52-100 dollars, with eight per cent interest on same from this date, and costs in this case, taxed in the sum of eleven and 95-100 dollars, and that the property attached, to wit, northeast quarter of section eight (8), township ninety-six (96), range forty (40) west of the 5th P. M. Iowa, be sold to satisfy said judgment and costs, and that a special execution issue for the sale thereof." If the portion which directed the sale of the attached property had been omitted, the judgment would have been a personal one, and therefore void. But it states the amount which the harvester company was entitled to recover, and that is essential in a judgment in rem. An entirety, it is sufficient, although perhaps not in the best form, to constitute a valid judgment against the land: See Mayfield v. Bennett, 48 Iowa, 194. In the cases of

Smith v. Griffin, 59 Iowa, 410, and Cassidy v. Woodward, 77 Iowa, 357, judgments might have been rendered against the land attached, but were in fact personal only.

3. It is said the judgment in question was void because the original notice was not served upon Griffith so as to leave twenty days between the day of service and the first day of the next term of court. As he was ⁶⁴⁰ a nonresident of this state, served outside of it, he was entitled to that service: Code, sec. 2602, subd. 3. But the fact was, only sixteen days intervened between the day of service and that on which judgment was rendered, and he was entitled to the time until the second term after service was made on him in which to appear: Code sec. 2602. The rendition of judgment at the first term after service was, therefore, irregular, and the judgment would have been set aside for that reason on proper application. To have been in time, the application must have been made not later than the second day of the next term: Code, sec. 3154, subd. 3, 3156. But the judgment would not have been vacated until it had been adjudged that there was a valid defense to that action: Code, sec. 3159. Section 2877 of the code authorizes a new trial upon the application of a defendant served by publication only, within two years after the rendition of the judgment, upon giving security for costs and showing a valid defense: Stanbrough v. Cook, 83 Iowa, 709. But that section does not apply to the case in question, for the reason that, although it was one in which service by publication might have been made, that actually made was personal: McBride v. Harn, 52 Iowa, 79. But Griffith has not merely failed to show any reason for not appearing and attacking the judgment within the time given by the statute for that purpose; he has also failed to show any valid defense to the action in which the judgment was rendered. It is said that as the action was a proceeding against the land, and the service was designed to give the court jurisdiction to render a judgment in rem, a strict compliance with all the requirements of the statute is essential to the validity of the judgment rendered. It is true that such a compliance has been held necessary in numerous cases. Thus it has been held that where the filing of ⁶⁴¹ an affidavit is a condition precedent to the service of notice by publication, a judgment rendered without an appearance by the defendant served only by publication, when the affidavit has not been filed, was void: Carnes v. Mitchell, 82 Iowa, 605; Chase v. Kaynor, 78 Iowa, 450; Bradley v. Jamison, 46 Iowa, 69. But no question of that kind is involved in this case.

The right of the harvester company to serve the notice to Griffith by publication, or personally outside of the state, is not in dispute, and the case is governed by the rules which determine the sufficiency of the service of notice, and the consequence of defective service. It is well settled in this state that where there has been a service of a required notice, and the proper court has determined that the service was sufficient, the subsequent proceedings based on such service are not void, but, at most, only voidable on proper application: *Irions v. Keystone Mfg. Co.*, 61 Iowa, 406; *Myers v. Davis*, 47 Iowa, 329; *Bunce v. Bunce*, 59 Iowa, 534; *Dougherty v. McManus*, 36 Iowa, 657; *Darrah v. Watson*, 36 Iowa, 117; *De Tar v. Boone County*, 34 Iowa, 488; *Bonsall v. Isett*, 14 Iowa, 311. In *Woodbury v. Maguire*, 42 Iowa, 341, this rule was approved, and held applicable to an attachment against a nonresident of the state who did not appear, and who was served with notice only by publication. Our opinion is, that the failure to serve the notice upon Griffith twenty clear days before the first day of the term at which judgment was rendered did not make the judgment rendered void, and that as he failed to take advantage of the defect in the manner provided by statute, and has not shown any reasonable excuse for his failure to do so, nor any defense to the action, the judgment will not be set aside now because of the defective service.

4. The action against Griffith was based upon two judgments rendered against him in favor of the ⁶⁴² Milwaukee Harvester Company. The name of the plaintiff was erroneously stated in the title of the petition as the Milwaukee Harvesting Company, but in the body of the petition, in the original notice, in the writ of attachment, and in the judgment, it was stated correctly. The correct name of the plaintiff was evident, and the mistake did not vitiate the judgment.

5. The execution and notice of sheriff's sale designated the plaintiff as the Milwaukee Harvesting Company, and the notice of sale was not published twice in a newspaper. The name of the defendant, the date, and the amount of the judgment, the court which rendered it, and the fact that the action had been aided by attachment which was levied upon the land in question, were all correctly set out in the execution, and the sale made thereunder was not void for the defects stated. Nor was the validity of the sale affected by any defect in the notice: Code, sec. 3081.

6. It is urged that the consideration for the sale was inadequate. As has been stated, the land was sold for one hundred

and sixty-nine dollars and twenty cents, although it was then worth about two thousand five hundred dollars more than the encumbrance upon it. Mere inadequacy of the amount for which the land is sold on execution will not make the sale invalid: *Peterson v. Little*, 74 Iowa, 223; *Sigerson v. Sigerson*, 71 Iowa, 476. The case of *Sioux City etc. Land Co. v. Walker*, 78 Iowa, 477, is not within the rule which governs this case. No fraud in the sale has been shown. So far as we are advised, it was conducted in all respects according to law, excepting in the failure to give notice as already shown. It was made subject to redemption, and we find no reason for setting it aside.

643 7. We have reached the conclusion that the sale must be held good only after giving the case a careful examination. We should have been better satisfied had we been able to affirm the judgment of the district court. But the plaintiff has no just grounds for complaint. The original notice which was served upon him notified him of the commencement of the action, and also that a writ of attachment had issued against his property. It is shown that he did not know of the sale, but it is not shown that he did not know that judgment had been rendered for the sale of the land. No diligence whatever on his part to appear in the case, to ascertain what had been done, or to make redemption from the sale, is shown. So far as we are advised, he did nothing whatever after the notice was served on him, until after the time for redemption had expired and the sheriff's deed had been executed. As he failed to take advantage of his statutory right to object to the judgment, and has shown no excuse whatever for his failure, and has made no attempt to redeem from the sale, there is no ground upon which a court of equity can grant him relief. It is suggested in a paper filed by the appellee, but which does not appear to have been served upon the appellant, that the abstract does not purport to contain all the evidence in the case. An additional abstract was filed by the appellee, which sets out a part of the record, but which does not in any manner deny that the two abstracts fully present the record. In the absence of any question raised by the additional abstract, we must presume that the two set out all of the record which is necessary to a determination of the case on its merits. For the reasons shown, the decree of the district court is reversed.

JUDGMENTS—JURISDICTION.—If a nonresident is not personally served with process within the state, and does not appear in the action, no valid personal judgment can be entered against him, unless his property is attached in the action: *Brown v. Campbell*, 100

Cal. 635; 38 Am. St. Rep. 314, and note; Willamette Real Estate Co. v. Hendrix, 28 Or. 485; 52 Am. St. Rep. 800, and note. Service of process beyond the state cannot authorize a personal judgment: Wilson v. St. Louis etc. Ry. Co., 108 Mo. 588; 32 Am. St. Rep. 624, and note.

JUDGMENTS IN REM.—WHAT ARE, and their effect as res judicata, are the subjects of the monographic note to Street v. Augusta Ins. etc. Co., 75 Am. Dec. 720-725.

PROCESS—POWER OF COURTS OVER.—All courts possess power over their own process. Such power is a species of equitable jurisdiction that is inherent alike in courts of law and equity: McLean County Bank v. Flagg, 31 Ill. 290; 83 Am. Dec. 224, and note.

EXECUTION SALES—SETTING ASIDE FOR INADEQUACY OF PRICE.—Mere inadequacy of price is not sufficient to avoid a sheriff's sale: Hollister v. Vanderlin, 165 Pa. St. 248; 44 Am. St. Rep. 657, and note. An execution sale will not be vacated for inadequacy of price, if the defendant is entitled to redeem therefrom, and has notice of the sale and an opportunity to exercise his right: Power v. Larabee, 8 N. Dak. 502; 44 Am. St. Rep. 577, and note.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

SMALL v. SMALL.

[56 KANSAS, 1.]

HUSBAND AND WIFE—GIFTS IN FRAUD OF WIFE.—Under the laws of Illinois and Kansas, a married man may, during coverture, in the absence of actual fraud and as against any postmortem claim of his widow, give away to his children the bulk of his property, though the known effect of so doing is to greatly diminish the share which she would have been otherwise entitled to upon his death.

Douthitt, Jones & Mason, and Waggener, Horton & Orr, for the plaintiffs in error.

Valentine, Godard & Valentine, Hayden & Hayden, and A. D. Walker, for defendant in error.

¶ **MARTIN, C. J.** Many questions respecting rights as well as remedies have been presented, and very ably argued orally and in the voluminous briefs of counsel, but we have found it necessary to decide only one of them. The underlying question is, whether, under the laws of Illinois or of Kansas, the several gifts and advancements made by Daniel Small to his children are to be treated as fraudulent and void as to his widow. Most of these gifts and advancements were made without the knowledge of Rebecca Small, and Daniel Small appears to have enjoined upon his children that the subject should not be mentioned to her, nor in her presence. Secrecy is often called a badge of fraud, but it is not fraud itself. If a man's disposition of his property is fair and lawful, the concealment of the transaction cannot render it fraudulent. If the rights of the children were dependent only upon the trust agreement of March 19, 1878, it ¹⁰ is doubtful if they could stand the test of law and equity,

for, notwithstanding the trust appeared upon its face to be a valid disposition of the property and securities therein mentioned, such as would be binding upon Daniel Small, yet the trusteeship of Darius Small seems to have been only nominal, and Daniel Small virtually controlled the property, and did as he pleased respecting it, just as he had done before; his son, Eli D. Small, the nominal attorney in fact of the trustee, merely assisting in the transaction of the business of collecting and reinvesting. If Daniel Small had died while the securities were in this condition and the Kansas lands in the name of Darius Small as trustee, probably it should be said that all belonged in equity to Daniel Small and formed part of his estate upon his death; but a considerable portion of the so-called trust fund was invested in the Kansas lands and improvements thereon, and both Daniel Small and the trustee, through his attorney in fact, conveyed the lands to the sons and the daughter absolutely in 1886. The advancements were made in 1882, and prior thereto, and we suppose they formed part of said trust fund and its accumulations, and nineteen days before the death of Daniel Small he made the final gift, exceeding one hundred thousand dollars. On April 1, 1888, two weeks before his death, Daniel Small had no control in law or equity of the money advancements, the Kansas lands, nor the notes, securities, etc., which were the subject of the gift of March 26, 1888. All were valid dispositions as to him, and he could not have recovered a dollar thereof from his children. Upon his death, they therefore formed no part of his estate, unless upon some established principle of law or equity his widow had a right to so consider them. And this brings us to the main question in the case, namely, under the laws of Illinois ¹¹ and of this state, may a married man during coverture, as against any postmortem claim of the widow, give away to his children the bulk of his property when the known effect of so doing is to diminish the share which she would have been otherwise entitled to upon his death? In this state, there are some limitations upon the right of disposition of real property by a husband where the wife is a resident of this state; but section 8 of our act concerning descents and distributions (Gen. Stats. 1889, par. 2599), which allows to the widow one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, not sold at judicial sale, and not necessary for the payment of debts, and to which the wife has made no conveyance, provides, further, that the wife shall not be entitled to any interest under said section in any lands to which the husband

has made a conveyance, when the wife, at the time of the conveyance, is not, and never has been, a resident of this state; and in *Buffington v. Grosvenor*, 46 Kan. 730, it was held that this proviso is constitutional. Under this decision Rebecca Small is cut off from any claim of right, title, or interest in the Kansas lands, and the court below was correct in so holding.

The advancements of money and the gifts of notes and securities of March 26, 1888, were made in Illinois, and, if lawful there, we should probably so consider them here, even though invalid if made in this state; and this leads us to a consideration of the laws of Illinois applicable to this subject. The controversy constituting the subject matter of the cases of *Padfield v. Padfield* in its several aspects was three times before the supreme court of Illinois, and received very full consideration: 68 Ill. 210; 72 Ill. 322; 78 Ill. 16. It was finally held in the last suit, which was brought ¹² by the widow, that any disposition of personal property and credits by a husband in good faith, where no right or interest is reserved to him either present or ultimate, though made to defeat the rights of his wife, will be good against her; and that there is nothing in the statute respecting the estates of deceased persons that in the slightest degree prevents the husband from disposing of his personal property free from any claim of his wife, whether by sale, gift to his children, or otherwise, in his lifetime. The court quotes approvingly from a note in *Kerr on Frauds and Mistakes*, 220, as follows: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence and exonerated from the claim of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her." And the court refers to *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Cameron v. Cameron*, 10 Smedes & M. 394, 48 Am. Dec. 759, *Lightfoot v. Colgin*, 5 Munf. 42, *Stewart v. Stewart*, 5 Conn. 317, and *Holmes v. Holmes*, 3 Paige, 363, as fully supporting the doctrine.

The court further says: "Again, the act of 1861, known as the 'Married Woman's Law,' confers upon *femes covert* the power of disposing of their separate property, absolutely and as they may choose, free from the control of their husbands. It was manifestly the intention of the general assembly to confer on married women the same and no greater rights, in regard to their prop-

erty, as were possessed by their husbands. It would be singular, and we cannot suppose that the legislature could have intended to confer other or greater power on the wife than upon the husband, To ¹³ hold that a feme covert has a vested interest in her husband's personal estate, that he is unable to divest in his lifetime, would be disastrous in the extreme to trade and commerce. Owning to commercial necessities, personalty must be left free for exchange, and, to be so, someone must be vested with full power to sell and transfer it free from latent and contingent claims."

It is contended by counsel for Rebecca Small that section 4 of the Illinois statute of frauds was amended in 1874, after the rights in the Padfield cases had vested, so that gifts made with intent to defraud "creditors or other persons" (the last three words having been added) were declared void, and that a widow comes within the designation of "other persons," and therefore the doctrine in the last Padfield case is changed by statute, and that this is recognized in *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642. In that case, it appears that William A. Tyler, in anticipation of proceedings by his wife against him for separate maintenance in Broome county, New York, went to Conneaut, Ohio, and assigned and delivered to his son, John B. Tyler, a large amount of notes, bonds, and mortgages, and also indirectly transferred to him certain lands. The suit was brought by the wife soon after the transfer. Afterward, William A. Tyler commenced an action in Illinois against his son to compel a reassignment of said notes, bonds, and mortgages, and a reconveyance of the lands; but it was held by the supreme court of Illinois that the action could not be maintained, said William A. Tyler having transferred the property with intent to defraud the wife, and to render any judgment for separate maintenance ineffectual, the wife coming within the designation of "other persons" in said section 4 of the statute of frauds as amended. The Padfield cases are not overruled, distinguished, nor ¹⁴ otherwise referred to, but the case follows *Draper v. Draper*, 68 Ill. 17, where it was held that a conveyance, after bill filed for divorce and alimony, with intent to deprive the wife of alimony, was fraudulent, and should be set aside. The phrase "other persons" probably would not include a widow seeking to enforce her rights under the statute of descents and distributions. When general words follow particular and specific words, the former must be confined to things of the same kind: *Sutherland on Statutory Construction*, secs. 268, 273, 277; *Guptil v. McFee*, 9 Kan. 30, 37; *White v. Ivey*, 34 Ga. 186, 199; *State v. McGarry*, 21 Wis. 496,

498. The word "creditors" serves to limit and control the generality of the following words, "other persons," so as to include only those of like or similar kind and nature to creditors.

There seems to be a distinction between the rights of a widow and those of a wife driven by the aggressions of her husband to a suit for alimony or separate maintenance. In the latter case, the wife is seeking to establish an unliquidated claim against her husband for money or property, and her relation to him is that of a quasi creditor. This dissimilarity is pointed out by Agnew, J., in *Bouslough v. Bouslough*, 68 Pa. St. 495, 499, as follows: "So the rule that forbids the wife to avoid the voluntary assignment or gift of her husband must change when her relation to him changes. There is no reason why a wife whose husband has deserted her, and refused to perform the duty of maintenance, or who, by cruel treatment, has compelled her to leave his house, and commence proceedings for divorce and maintenance, should not be viewed as a quasi creditor in relation to the alimony which the law awards to her. So long as she is receiving maintenance, and is under his wing, as it were, she is bound by his acts as to his personal estate; but when she is compelled ¹⁵ to become a suitor for her rights, her relation becomes adverse, and that of a creditor in fact, and she is not to be balked of her dues by his fraud."

Recognizing this distinction, it would seem that Rebecca Small, while residing with her husband in the most amicable relations, could not have maintained an action to set aside or annul the advancements and gifts to the children, nor to compel either her husband or the children to account to her for the same; and, as these advancements and gifts were valid as to her and valid as to Daniel Small when made, they formed no part of the estate at his death. But we need not go so far in this case.

The reasoning in *Padfield v. Padfield*, 68 Ill. 210, 72 Ill. 322, 78 Ill. 16, as to the "Married Woman's Law" in Illinois is of much force here. In some states, property acquired during coverture is known as "community property," and partakes to some extent of the nature of partnership property between husband and wife; but our legislation is in the opposite direction, manifesting a purpose to maintain, as far as practicable, the separate rights of husband and wife as well to accumulations during as before the existence of the marriage relation, and each is entitled to dispose of his or her own goods and chattels, with a slight modification as to mortgaging the same. Some of our former decisions have accorded in spirit with the doctrine established in Illinois: *Butler v. Butler*, 21 Kan. 521, 525, 526; 30 Am. Rep. 441; *Mun-*

ger v. Baldridge, 41 Kan. 241-244; 13 Am. St. Rep. 273. The cases of Busenbark v. Busenbark, 33 Kan. 572, and Green v. Green, 34 Kan. 740, 55 Am. Rep. 256, both relate to protection of the husband and wife, respectively, during coverture from fraudulent alienation of real estate by the other, and are only remotely analogous to the case now under consideration.

¹⁶ In Williams v. Williams, 40 Fed. Rep. 521, in the circuit court of the United States for the district of Kansas, Foster, J., delivering the opinion of the court, said: "The main question, in its broadest sense, is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be, that if such gift is bona fide and accompanied by delivery, the widow cannot reach the property after the donor's death. . . . Neither the wife nor children have any tangible interest in the property of the husband or father during his lifetime, except so far as he is liable for their support; and hence he can sell it or give it away without let or hindrance from them. Of course, the sale or gift must be absolute and bona fide, and not colorable only. And if the sale or gift would bind the grantor, it would bind his heirs."

We are aware that the authorities are not all in harmony upon this subject, but the cases asserting a contrary doctrine are generally under statutes or customs different from those of Illinois and Kansas; and we think the weight of authority in states having statutes upon this subject of the same general nature as our own establishes the doctrine herein announced. We cite some authorities in addition to those hereinbefore given, viz.: Pringle v. Pringle, 59 Pa. St. 281; Lines v. Lines, 142 Pa. St. 149; 24 Am. St. Rep. 487; Richards v. Richards, 11 Humph. 429; Sanborn v. Goodhue, 48 N. H. 48; 59 Am. Dec. 398; Ford v. Ford, 4 Ala., N. S., 142, 146; Smith v. Hines, 10 Fla. 258, 285; Stewart on Husband and Wife, sec. 301; Thornton on Gifts and Advancements, sec. 488.

We are of opinion that the rights of Rebecca Small are controlled by the will and the contract of May 9, 1888. If there was any real estate or personal property in Illinois or elsewhere not disposed of by the will ¹⁷ nor included in the contract, of course she is entitled to her proper share of the same.

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

All the justices concurring.

HUSBAND AND WIFE—GIFTS IN FRAUD OF WIFE.—A husband has the power to dispose of his personal property in good faith by gift or otherwise during coverture free from all post-mortem claims thereon by his widow, but a conveyance of real estate made by a husband during coverture for the purpose of defeating the wife's marital rights is fraudulent and void as to her: *Walker v. Walker*, 66 N. H. 390; 49 Am. St. Rep. 616, and note. See, also, the extended note to *Lines v. Lines*, 24 Am. St. Rep. 490-494.

SHORTEN v. JUDD.

[56 KANSAS, 43.]

PARTITION—RIGHTS OF HEIR—PRACTICE.—If partition is sought by an alleged heir only as to real estate of which he claims a portion, and no part has been sold for the payment of debts, and no division has been made, he may have specific relief as to the property itself, and need not pursue the circuitous remedy prescribed by statute, of contribution in the probate court.

WITNESSES—COMPETENCY.—If a party to an action, claiming to be the widow and entitled to a share of the estate of her alleged husband deceased, is incompetent under the statute to testify as to certain facts necessary to be proved on the part of her son, also a party to the suit and claiming a share of such estate, she is not rendered a competent witness in behalf of her son by a disclaimer of all interest in her own behalf after the close of the evidence, but, after such disclaimer, she is a competent witness for the son on a new trial.

EVIDENCE—DECLARATIONS AS TO RELATIONSHIP.—Declarations of a person since deceased as to relationship, descent, birth, or marriage, are admissible in evidence when such matters are in controversy, and such declarations concern his family affairs.

EVIDENCE—FAMILY RESEMBLANCE.—OPINIONS OF WITNESSES as to family resemblance between a child and its alleged father are not admissible as proof of paternity.

EVIDENCE OF PATERNITY—FAMILY RESEMBLANCE.—Evidence of family resemblance by view and comparison of the jury is admissible in proof of parentage, if the child on view has attained an age when its features have assumed some degree of maturity and permanency, or if the putative father is dead, his photograph, proven to be a good likeness of him, is admissible for the purpose of such comparison.

Action to set aside a will and for partition. William Judd married Mary Toler on October 10, 1880, and one year thereafter Jennie L. Judd, the only issue of the marriage, was born. She died unmarried on May 3, 1890. In 1882, Mary Judd obtained a divorce from her husband, William Judd, and on July 12, 1886, he executed a will bequeathing all his property to his daughter Jennie. He died on June 11, 1888, possessed of three hundred and thirty acres of real estate and a considerable amount of personal property. John Judd, the plaintiff, was born Febru-

ary 2, 1889, and claimed to be the legitimate son of a common-law marriage between said William Judd and Sadie Runkle, which took place about April 1, 1888. On January 27, 1889, Sadie Runkle married John Mott. In November, 1890, Mary Judd married Frank Shorten. On June 19, 1890, John Judd and Sadie Runkle-Mott commenced this action to set aside the will of William Judd and for partition of said real estate, one-half to John Judd, and the other half to Sadie Runkle-Mott. Mary Judd-Shorten and Frank Shorten were made defendants. Judgment partitioning the property, one-half to John Judd and the other half to Mary Shorten. The latter, claiming the whole estate as sole heir of Jennie L. Judd, appealed.

J. H. Crain and W. L. Simons, for the plaintiff in error.

C. E. Cory, W. R. Biddle, and J. I. Sheppard, for the defendant in error.

⁴⁶ MARTIN, C. J. 1. Counsel for plaintiff in error contend that the district court had no jurisdiction of the subject of the action, and that relief should have been sought in the probate court by way of contribution, and sections 39, 58, 59, 60, 61, and 62 of chapter 117 of the General Statutes of 1889, being an act relating to wills, are cited in support of this position. It is our opinion, however, that where relief is sought only as to real estate, and no part thereof has been sold for the payment of debts, and no division has been made, an heir may have specific relief as to the property itself, and need not pursue the circuitous remedy of contribution in the probate court.

2. It is virtually conceded in the briefs of defendant in error, John Judd, that Sadie Runkle-Mott was incompetent, under section 322 of the code, to testify as to the transaction or communication with William Judd relied on as proof of the marriage; but it is claimed that the error was cured by the renunciation made on her behalf. At the time of the renunciation, however, all claim had been withdrawn to the effect that the plaintiff below might recover as the illegitimate son of William Judd, and it was necessary to prove the marriage in order to give him any standing whatever in court. His mother had been made a defendant, but she was united in interest with the plaintiff, and might have been joined with him. In her answer she claimed a one-half interest in all the ⁴⁷ property, and her testimony in support of the marriage was more in her own behalf than in support of the claim of her son. It would not do to allow her to experiment with the double claim in behalf of herself and her

son until the close of the evidence, and then make her incompetent testimony competent for her son by withdrawing her own claim. On account of this error, the judgment must be reversed; but, as Mrs. Mott has now disclaimed any interest, she will be a competent witness as to the alleged marriage on the next trial.

3. The plaintiff in error complained of the admission in evidence of certain statements and declarations of William Judd to Doctor Elder and others concerning his relations with Sadie Runkle, and tending to prove a common-law marriage and the paternity of her son. We hold, however, that the evidence was competent under the rule that allows the declarations of a deceased person to be given in evidence where the fact of relationship, descent, birth, or marriage is in controversy, and the declarations concern his family affairs: *Smith v. Brown*, 8 Kan. 609, 620; 1 *Greenleaf on Evidence*, sec. 134; *Betsinger v. Chapman*, 88 N. Y. 487, 496, 499; *Branch v. Texas etc. Mfg. Co.*, 56 Fed. Rep. 708, 713.

4. Certain witnesses acquainted with William Judd in his lifetime, and who saw the little boy in court, were allowed to testify on the point of family resemblance between the two. In our opinion, this was not a proper subject of expert or opinion testimony, and it ought to have been excluded: *Keniston v. Rowe*, 16 Me. 38, 40; *Eddy v. Gray*, 4 Allen, 435, 438.

5. A photograph of William Judd was admitted in evidence for the purpose of comparison of features ⁴⁸ with the child in court. While in most cases evidence of family resemblance by view and comparison of the jury is of little value in proof of parentage, yet it has often been held admissible where the child has attained an age when its features have assumed some degree of maturity and permanency. Where the child is a young infant, it has been held best not to exhibit it to the jury. Much must be left to the discretion of the trial court, however, as to the proper age, and we would not feel warranted in a reversal of the judgment in this case on account of the child's appearance before the jury: *State v. Danforth*, 48 Iowa, 43, 47; 30 Am. Rep. 387; *State v. Smith*, 54 Iowa, 104; 37 Am. Rep. 192; *Gilmanton v. Ham*, 38 N. H. 108, 112, 113. And where the putative father is dead, and a photograph, proven to be a good likeness of him, is offered in evidence for the purpose of comparison with the child in court we think it admissible: 2 *Rice on Evidence*, sec. 435, et seq; *Udderzook v. Commonwealth*, 76 Pa. St. 340; 352, 355; *People v. Webster*, 68 Hun, 11, 17.

The instructions given to the jury to aid in answering the two

questions whether Sadie Mott, formerly Sadie Runkle, was the wife of William Judd at the time of his death, and whether John Judd was the son of William Judd, pretty fully covered the subject; but as to the alleged contract of marriage being executory and conditional, and not executed and absolute, see *Carmichael v. State*, 12 Ohio St. 553, 559, 560, and *Port v. Port*, 70 Ill. 485, 488, 490.

We have purposely refrained from the expression of any opinion as to the sufficiency of the evidence to sustain the findings of the court and the jury that there was a marriage between William Judd and Sadie Runkle, for, as the case must go back for a new trial, the parties will have opportunity for the ⁴⁰ introduction of any new evidence which may be disclosed to throw light upon the subject.

The judgment will be reversed, and the case remanded for a new trial.

Johnston, J., concurring.

Allen, J., dissenting.

EVIDENCE.—DECLARATIONS OF A DECEASED PERSON are admissible in evidence against those who claim in the interest or right of such decedent: *Connecticut etc. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944, and note. See, also, the extended note to *Cox v. State*, 37 Am. Rep. 83.

EVIDENCE—FAMILY RESEMBLANCE.—On the trial of an indictment for seduction, a child, alleged to have been born of the alleged intercourse, cannot be exhibited to the jury as corroborative evidence for the prosecution on account of its resemblance to the defendant: *State v. Danforth*, 48 Iowa, 43; 30 Am. Rep. 387. In a bastardy proceeding, the public prosecutor exhibited the child to the jury and commented on its resemblance to the defendant. It was held not to be error, especially where the court instructed the jury that if they did not see the resemblance they should disregard the comments: *State v. Smith*, 54 Iowa, 104; 37 Am. Rep. 192.

CAWOOD v. WOLFLEY.

[56 KANSAS, 281.]

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES—SERVANTS' WAGES.—Wages due a clerk for services, rendered prior to as well as during, the last illness of his deceased employer are included in the term "wages of servants," used in a statute classifying, and providing for the settlement of claims against the estates of deceased persons.

Wells & Wells, for the plaintiffs in error

S. K. Woodworth, for the defendant in error.

²⁸¹ ALLEN, J. The sole question presented by the record in this case is, whether in the classification of demands against the estate of a deceased person, the wages of a clerk employed by the decedent in his store for a period prior to his last illness are to be included, under the provisions of section 80, chapter 37, of the General Statutes of 1889, in the second class. The first part of the section reads as follows: "All demands against the estate of any deceased person shall be divided into the following classes:
²⁸² 1. Funeral expenses; 2. Expenses of the last sickness, wages of servants, and demands for medicines and medical attendance during the last sickness of the deceased, and the expenses of administration."

Is a clerk a servant within the meaning of this language, and, if so, are the wages confined to those accruing during the last illness of the deceased? No direct authority is cited or known to us on the question. The legislature in more than one enactment has manifested a purpose to secure to all wage-earners their hire, and to prefer their claims to those of most other creditors. It is conceded that the term "servant" in its usual acceptation, especially in the law, is broad enough to include a clerk; but it is argued that the word is here used in a restricted sense, and means only menial or household servants. We are loth to recognize any such classification in Kansas as menial servants. The word is broad enough to include a clerk, and we think the legislature intended it should do so. Nor do we think the wages referred to are limited to those earned during the last illness of the deceased. In this particular case, the amount of wages conceded to be due is unusually large, but that fact cannot affect the general rule. Though the language used might, perhaps, be held to restrict the time to the period of the last sickness, we think it is capable of the other construction, and that the legislature intended to classify all wages of servants ahead of debts due the state, judgments, and demands of the fifth class.

The judgment of the district court will be modified by classifying the demand allowed the plaintiffs in the second class, instead of the fifth. Judgment will be entered in this court in favor of the plaintiffs in error for costs.

All the justices concurring.

MASTER AND SERVANT—WHEN RELATION EXISTS.—One is not a servant of a testator and entitled to participate as such in a bequest in favor of the servants in his employ at his death if he did not serve such testator continuously, though he was employed for several years two days and more each week at odd jobs, assist-

ing the regular servants, and was in fact so employed at the time of the testator's death: *Metcalf v. Sweeney*, 17 R. I. 213; 33 Am. St. Rep. 864. This question is discussed in the extended note to *Brown v. Smith*, 22 Am. St. Rep. 459-463.

COURTNEY v. STAUDENMEYER.

[56 KANSAS, 392.]

PAYMENT IS PRESUMED AFTER THE LAPSE OF TWENTY-SEVEN YEARS from the maturity and last indorsement of payment of interest on a note, although the statute of limitations has not barred an action thereon because of the nonresidence and absence of the defendant.

T. J. White, for the plaintiff in error.

C. D. Walker, J. L. Berry, and Waggener, Horton & Orr, for the defendant in error.

³⁹⁶ MARTIN, C. J. A period of twenty-seven years elapsed from the maturity of the last note and the indorsement of interest paid thereon before any attempt was made to recover upon the indebtedness, or to foreclose the mortgage, yet the action was not barred by our Kansas statute of limitations because of the nonresidence and absence of the defendants (Civ. Code, sec. 21), and the South Carolina statute was not pleaded. At the common law, a presumption of payment arises after the lapse of twenty years, and the principal question in this case is, whether such presumption obtains in this state, notwithstanding the statute of limitations. It is claimed by the plaintiff in error that the common law is adopted in this state only in aid of the general statutes, and as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people (Gen. Stats. 1889, par. 7281), and that the doctrine of the presumption of payment from the lapse of time is inconsistent with our statutes of limitation, and therefore cannot be recognized. In England, however, this presumption arises, and is given effect, in the courts both of law and equity, ³⁹⁷ notwithstanding the limitation acts. In the case of *Smith v. Clay*, decided in 1767, and a report of which may be found in 3 Brown, 640, Lord Camden said: "A court of equity . . . has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. . . . Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." And in *Hovenden v. Lord Annesley*, 2 Schoales & L. 607,

636, Lord Redesdale said, "that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years."

The federal courts have declared the same doctrine, from an early day down to the present time, refusing, independently of the statute of limitations, to entertain and enforce stale demands: *Piatt v. Vattier*, 9 Pet. 405, 416, 417; *McKnight v. Taylor*, 1 How. 161; *Bowman v. Wathen*, 1 How. 189, 193; *Speidel v. Henrici*, 120 U. S. 377, 387, and cases cited. The state courts very generally hold the same doctrine. Several of the decisions are cited in the foregoing cases from the supreme court of the United States, and we will refer to a few others, as follows: *Cheever v. Perley*, 11 Allen, 584; *Kellogg v. Dickinson*, 147 Mass. 432, 437, and cases cited; *Bean v. Tonnele*, 94 N. Y. 381, 385; 46 Am. Rep. 153, and cases cited; *Matter of Accounting of Neilley*, 95 N. Y. 382, 390; *Lash v. Von Neida*, 109 Pa. St. 207; *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804; *Shubrick v. Adams*, 20 S. C. 49, 53; *Wright v. Mars*, 22 S. C. 585; *Dickson v. Gourdin*, 26 S. C. 391; *Stimis v. Stimis* (N. J. Eq., Dec. 17, 1895), 33 Atl. Rep. 468.

The presumption of payment from lapse of time differs essentially from a statute of limitations. The ³⁹⁸ presumption may be rebutted by sufficient evidence, no matter how long the time may be; but a statute of limitations cuts off the right of action, although it may be admitted that no payment has ever been made. The presumption of payment is based upon the experience of mankind that vouchers, acquittances, and evidences of payment are not usually preserved from one generation to another; that creditors usually desire their own without waiting a score of years upon their debtors; and that, where there has been no recognition of the claim by the debtor, and the creditor has forborne to assert a right for so long a time, it is most probable that his claim has been in some way satisfied. The cross-petition for foreclosure in this case was in the usual form. No explanation or excuse was given for the long delay in the assertion of any right, and this seems to be necessary under several of the authorities cited. But, if this defect of pleading had been remedied, yet the facts found, and the evidence received and rejected, were insufficient to establish nonpayment; and therefore the presumption of payment from lapse of time was properly held by the court below to be effective as a bar to the action, and the judgment must be affirmed.

All the justices concurring.

PAYMENT—PRESUMPTION OF FROM LAPSE OF TIME.—All debts excepted out of the statute of limitations, unclaimed and unrecognized for twenty years, are, in the absence of sufficient explanatory evidence, presumed to have been paid: *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804. See, also, the notes to *Husky v. Maples*, 88 Am. Dec. 590; *Morrison v. Collins*, 14 Am. St. Rep. 828, and the extended note to *Alston v. Hawkins*, 18 Am. St. Rep. 879.

RICHARDSON v. JONES.

[56 KANSAS, 501.]

CHATTEL MORTGAGES—RETENTION OF POSSESSION WITH POWER TO SELL.—A chattel mortgage of stallions, kept for breeding purposes, providing that the mortgagor may retain possession of the horses until default and may sell any or all of them, "the proceeds of such sale to be applied in payment of said [mortgage] notes" is inoperative and void as to other creditors of the mortgagor.

Jetmore & Jetmore, for the plaintiff in error.

Keeler, Welch & Hite and E. Hagan, for the defendants in error.

503 ALLEN, J. It is only necessary to consider a single question presented by the record before us. The plaintiff's claim rests entirely on the chattel mortgage given by Chalfant to Stanford. It is not claimed that the plaintiff ever had possession of the property either before or after its seizure by the marshal. There is no direct testimony in the record as to the transaction between Chalfant and Stanford. The only evidence with reference to it is the promissory notes and the chattel mortgage, which were offered in evidence, and the testimony as to surrounding circumstances, and their declarations with reference to the matter. There is no evidence showing that any consideration other than the notes and mortgage passed from Chalfant to Stanford in payment for the horses. The mortgage under which the plaintiff claims contains a provision by which the mortgagor reserves the unrestricted right to sell the mortgaged property, followed by the statement that the proceeds are to be applied to the payment of the notes. There is no provision as to the manner in which it shall be so applied, nor does the instrument in express terms nor by fair implication make the mortgagor the agent of the mortgagee to receive the purchase money. The right to sell would appear rather to be reserved to him as mortgagor, leaving the mortgagee no security after the mortgaged property is sold, but the mere personal liability of the mortgagor. It is insisted

that this court has sustained the validity of chattel mortgages ⁵⁰⁴ containing similar provisions. In the case of *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171, it was held that a chattel mortgage might contain a valid stipulation for the retention of possession of the mortgaged property by the mortgagor; and, further, that when it was so retained, and by an agreement outside the mortgage the mortgagor was permitted to dispose of the goods in the ordinary course of a retail business, and to use a portion of the proceeds in support of his family, paying the remainder in discharge of the mortgage debt, the transaction was not, as a matter of law, rendered fraudulent and void as against creditors, but would be upheld or condemned according as it was carried out in good faith or not. In that particular case the mortgage was held valid, the chief justice dissenting. In the case of *Leser v. Glaser*, 32 Kan. 546, a chattel mortgage was given which, by its terms, permitted the mortgagor to retain possession of the property, which was also a stock of merchandise, and to sell the same in the regular course of trade at retail. It was claimed that there was actual fraud. The mortgage was held void, not, however, solely because of its provisions but under all of the testimony with reference to it. The correctness of the doctrine announced in the case of *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171, has been often questioned, but the case has never been overruled. The cases in which it has been applied have been of mortgages on stocks of merchandise purchased for sale at retail. In the case of such a mortgage, the retention of possession by the mortgagor would be of no benefit to him unless permitted to continue the sale of the property in the usual course of trade, and thus continue his business and realize the best obtainable price in the retail market. Where an arrangement is made between the mortgagor and the mortgagee, by which ⁵⁰⁵ the mortgagor acts in good faith strictly as the agent of the mortgagee, to sell the property at retail for his benefit, the transaction has been upheld by this court; and in some cases the court has gone so far as to uphold an arrangement by which the mortgagor was allowed to use a portion of the proceeds for his support. The view taken has been that the sale of the goods at a favorable price would necessarily entail expense, and that, where the mortgagor consented to and did act as the agent of the mortgagee in effecting the sale for a less compensation than it would have been necessary to pay to a stranger, the fact of making such an allowance could not be held conclusive proof of fraud: *Hughes v. Shull*, 33 Kan. 127; *Howard v.*

Rohlfing, 36 Kan. 361; Whitson v. Griffis, 39 Kan. 211; 7 Am. St. Rep. 546; Bliss v. Couch, 46 Kan. 400; Standard Implement Co. v. Parlin etc. Co., 51 Kan. 632; Lorie v. Adams, 51 Kan. 692. In this case, as in that of Leser v. Glaser, 32 Kan. 546, all of the facts disclosed by the record concerning the transaction between Stanford and Chalfant indicate that their purpose was to defraud. The plaintiff resided a long distance away from the parties to the transaction. The power to sell the mortgaged property is unrestricted as to price, as to the time of sale, as to the purchaser, and as to the mode of payment. The only provision that could possibly be construed into an agency is contained in the words, "the proceeds of sale to be applied in payment of said notes." This is nothing more than an agreement that after the sale of the mortgaged property the mortgagor will turn over to the mortgagee the proceeds. After the sale the mortgagee's security is gone; the title to the property has passed by virtue of the authority reserved to the mortgagor in the very instrument itself. The claim, then, of the mortgagee is nothing more than a ⁵⁰⁶ personal claim against his debtor. In this case, the mortgaged property consisted of horses kept for breeding purposes. In order that the mortgagor might retain the beneficial use of them, it was not necessary, as in the case of a stock of merchandise kept for sale by a dealer, that he should be permitted to sell them. It was only necessary that he should be permitted to continue to use the horses for the purposes for which they were purchased. Instead, however, of reserving the right so to use them, he reserves the right to make an absolute sale of the whole mortgaged property in gross. The result of upholding such a mortgage as this is to place the property beyond the reach of all other creditors of the mortgagor, and make it a valid security, so far as their claims are concerned, while leaving it altogether optional with the mortgagor as to how long it shall remain as a security for his debt to the mortgagee. Whenever he sees fit to exercise his power to sell he can at once cancel the security. In order to uphold this as a valid mortgage, we must extend the doctrine announced in Frankhouser v. Ellett, 22 Kan. 127; 31 Am. Rep. 171. This we are unwilling to do. That case was an extreme one, and the doctrine announced in it is not to be extended to cases not clearly within the rules there declared. In this conclusion we are sustained by the great weight of authority: Jones on Chattel Mortgages, sec. 422.

The transaction between Stanford and Chalfant rests for its validity on the presumption of good faith which is applied to

the dealings of men. The evidence in the case is sufficient to overcome this presumption, and to establish its fraudulent character, without reference to the provision contained in the chattel mortgage; and, when this is added, no doubt is left of the fraudulent purpose of these parties. The ⁵⁰⁷ reservation of a right to sell the property by the mortgagor was sufficient at least to put the plaintiff in this case on inquiry as to the character of Chalfant's title, and therefore to leave him in no better position than the party under whom he claims. The plaintiff made no attempt to take the property into his possession from Chalfant, nor to recover it from the marshal, until after judgment had been rendered in the United States court ordering the property to be sold. He seems to have placed unusual reliance on the strength of his security, notwithstanding it contained a provision by which he might be deprived of it on any day. While, in the books, such mortgages are usually spoken of as fraudulent, possibly it would be more accurate to speak of them as inoperative, because they are contradictory in their terms, the conveyance of title being effectually defeated by the power reserved by the mortgagor to defeat the title and pass it to another.

The judgment of the trial court was right, and is affirmed.

All the justices concurring.

CHATTEL MORTGAGES—POSSESSION AND SALE OF GOODS BY MORTGAGOR.—RIGHTS OF CREDITORS.—A mortgage of a stock of goods, under which the mortgagor is permitted, by agreement in or out of the mortgage but executed at the same time, to sell the goods at discretion or in the usual course of trade without any agreement to account for the proceeds, is fraudulent and void, as to the existing creditors of the mortgagor without regard to the intent of the parties to the mortgage: *Eckman v. Munterlyn*, 32 Fla. 367; 37 Am. St. Rep. 109, and note. But a chattel mortgage given to secure a bona fide debt and authorizing the mortgagee to sell the goods and apply the proceeds to the extinguishment of the debt is valid as against the other creditors of the mortgagor: *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851. This subject will be found fully treated in the extended note to *Peabody v. London*, 15 Am. St. Rep. 912-917, and the notes to *Dobyns v. Meyer*, 6 Am. St. Rep. 34, and *Hage v. Campbell*, 23 Am. St. Rep. 427.

PAOLA GAS COMPANY v. PAOLA GLASS COMPANY.

[56 KANSAS, 114.]

DAMAGES.—MEASURE OF DAMAGES FOR BREACH OF CONTRACT by a natural gas company to supply a glass factory starting into a new business in the vicinity with sufficient fuel to operate for a certain period is the expense, necessarily incurred in establishing the factory and in the unsuccessful attempt to operate it together with the fair rental value of the idle factory, if it has any, and, if not, then interest on the money invested, together with interest on any idle working capital which could not be used by reason of the violation of the contract, and, if men skilled in the manufacture of glass had to be brought from a distance, the cost of their transportation and the compensation which the glass company had agreed, and was required, to pay for the necessary services of its officers, may be treated as part of the necessary expenses of the attempted operation for which the gas company is liable, but the prospective profits of the glass business embrace too many elements of uncertainty to form a just basis for measuring the damages sustained by reason of the breach of the contract.

EVIDENCE—ACCOUNT-BOOKS.—A witness who has not kept the books or payroll of a corporation, and who has no recollection of the facts independently of them, cannot state the contents of such books or payroll.

H. C. Meehem and S. Baker, for the plaintiff in error.

Warner, Dean, Gibson & McLeod, and N. H. Loomis, for the defendant in error.

618 JOHNSTON, J. The principal inducement for establishing a glass factory at Paola was the cheap fuel which it was supposed could be obtained there, and which the gas company agreed to furnish. The manufacture of glassware was an untried enterprise in the west. It was unsuccessful, and the cause of the failure is the main subject of dispute. On one side, it is contended, that it was due to an insufficient supply of gas, which the gas company had agreed to furnish; and on the other side, the contention is, that the supply was ample, but that the factory was defective in plan and faulty in construction, so that the gas supplied was not utilized. The findings of the referee, based as they are upon conflicting testimony, **619** settle the contention in favor of the glass company. It must be assumed in this review that the sole cause of the failure was the violation of the contract by the gas company in refusing to furnish the quantity of gas that it had agreed and was able to supply. The contract having been broken by the gas company, it must be held liable for all the direct and proximate damages which resulted from the breach. How shall the damages be measured? The allowance made by the referee was in two items: 1. Nine thousand dollars

for the expense incurred in the unsuccessful attempt to operate the factory; and 2. Ten thousand dollars for the anticipated profits of running the factory for a period of ten months. As to the first item, there is no dispute except as to the amount of the allowance. It is conceded that the glass company is entitled to recover the actual loss incurred in the unsuccessful attempt to operate the factory. There is a controversy as to what constitutes actual expense of operation, and it is contended that the allowances made were not established by competent testimony. In an attempt to show that expense or loss, the president of the glass company was permitted to state the amount of the payrolls of the company and the contents of some of the books of account. He did not have the payrolls or books at hand, and it does not appear that he had prepared or kept them. It is clear from his testimony that he had not personally attended to the payments for labor, material, utensils, machinery, and repairs, and he did not pretend to have any definite knowledge as to either items or amounts, except as he obtained them from the books and accounts. In the absence of personal knowledge of the witness or other proof of actual payment, the expenses incurred could properly have been shown by the payrolls and books; ⁶²⁰ but before they could have been offered it was necessary that they should have been identified, and to show that they were kept in such a manner as to make their contents receivable in evidence. There was no showing as to what the books were—whether they contained a payroll, and under whose direction or supervision they were kept; whether the entries therein were correct, or made at or near the time when payments were made. Without having transacted the business, or having any recollection of the facts independently of the books, he was allowed to testify of losses amounting to nine thousand dollars, which were necessarily made up from a great number of items. The information which he had, however correct it may have been, was derived from others and from books and accounts of which it is not shown that he had any knowledge at all. His testimony as to what was shown by the payrolls and books is obviously incompetent. This was substantially all the testimony upon which the greater part of the allowance for the net cost of the unsuccessful operation of the plant rested. His testimony was that the payrolls showed that over seven thousand dollars was paid to operatives, while in another part of his testimony he stated that the cost of the product made during the time of operation was between five and six thousand dollars; and upon this incompetent

and inconsistent testimony the referee found that the amount paid to operatives was five thousand six hundred and fifty dollars. The testimony upon this matter was incompetent and wholly insufficient to sustain the finding that was made.

Objection is made to the allowance of the expenses in bringing operatives to Paola. It appears that men skilled in the manufacture of glass could not be found in Kansas, and therefore the company was obliged ⁶²¹ to go to St. Louis and other points for skilled operatives. In order to manufacture glassware, it was necessary to have men who were skilled in that business; and, if it was necessary to pay the cost of their transportation in order to induce them to come west, we think it may be treated as a part of the expenses of the actual operation of the factory.

The allowances made to the officers of the corporation are contested. The mere fact that they were officers of the corporation, or that they might have been entitled to salaries from the corporation, does not require that the salaries shall be treated as a part of the expenses of operation. If the services performed by them were necessary to the operation of the factory, the compensation which the company had agreed or was required to pay for such services should be treated as a part of the expense of operation for which the gas company is liable. The liability, however, should be confined to actual expenses, properly and necessarily incurred in the unsuccessful attempt to manufacture glass. Some of the testimony regarding the expenses of operation was incompetent, as we have seen, and some was weak in failing to show that the expenses allowed were reasonable and necessary, or necessarily and actually paid out; and the fact that the referee made an allowance of about four thousand dollars more than was claimed in the petition emphasizes the errors that were committed.

The main contention, however, in the case is over the allowance of prospective profits. The contract was doubtless made, and the enterprise undertaken, for the profits expected to be gained. The gas company must have been aware that that was the purpose of ⁶²² the venture, and, if the failure was due to the fault of that company, it cannot escape liability for the actual loss sustained. It is urged that damages cannot be measured by the anticipated profits, as the calculation is necessarily based on conjecture, rather than upon facts. It is the aim of the law to give a party injured by the breach of a contract all the damages which he may suffer from such breach: and where the contract is made with a view to future profits, and such profits are

within the contemplation of the parties, they may, where they can be established with certainty, form a just measure of damage. It has been said that, as a general rule with a few exceptions, anticipated profits prevented are not recoverable in the way of damages for the breach of contract; but it is well settled in this state that damages based on prospective profits which would have been realized had the contract been performed may be allowed, providing they are fairly within the contemplation of the parties, are the direct and natural consequence of the breach of the contract, and are susceptible of being ascertained with reasonable certainty: *Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267; *Arkansas Valley etc. Co. v. Lincoln*, 56 Kan. 145.

All the authorities agree that profits which are conjectural, and cannot be measured by the usual rules of evidence to a reasonable degree of certainty, are not recoverable. The manufacture of glass in Kansas was subject to many uncertain contingencies, and the profits that would have been realized if the business had continued are largely a matter of speculation and conjecture. No such business had ever been established in Kansas, the material found here had not been used for the making of glass, and whether the natural gas discovered at Paola could be successfully ⁶²³ applied and utilized was a problem. In many respects the manufacture was only an experiment. It is estimated, however, that in the brief period of ten months, and with only a small investment, the net profits would have reached the sum of ten thousand dollars. The success of the adventure depended not alone on the supply of fuel. If material could be obtained at fair prices, skilled and careful workmen employed at reasonable wages, and kept steadily at work, and if, with fuel, material, labor, and skill, the large product that was estimated by the referee could have been made, the enterprise might still fail. A market must be found for the product, and it would have to be sold in a new field for an amount in excess of the cost of production. That involves the advertising of the business and the company, which, as yet, had no standing in the business world, the building up of a credit and a reputation, the state of the glass trade in the country during the ten months, including the fluctuations of the market, the competition that would have to be met, the railroad rates, and the cost of sale and distribution. There are other elements of uncertainty; and what assurance is there that any profit whatever could have been made during the continuance of the contract? Then there are the mishaps which usually attend the establishing of a new industry—

the delay or failure in obtaining suitable material, the breaking of machinery, accidents in the application of natural gas, which was an untried fuel, or resulting from the careless or unskillful acts of employes, a misfortune in the melt of the glass, which sometimes occurs, breaking utensils or appliances that would have caused both delay and expense. It will be conceded that only a small proportion of the industrial enterprises attempted are successful, and a ⁶²⁴ much fewer number of them realize profits during the first ten months of their existence. If it had been an established business, or if other manufactories of a like kind existed in Kansas under similar conditions, there would be some basis of estimating profits; but we fail to find any safe guide in measuring the gains that would have been made by this factory if fuel had been supplied. Some of the parties connected with this enterprise had been engaged in the manufacture of glass at St. Louis, where coal was used for fuel; but the testimony discloses that its operation resulted in losses rather than gains. Who can say that there would have been a different result by the operation of a factory in Kansas for the short period of ten months? Where the expected profits depend upon so many contingencies and are so uncertain, and speculative in character as in this case, a different measure of damages must be employed: *Sherman Center etc. Co. v. Leonard*, 46 Kan. 354; 26 Am. St. Rep. 101.

Much reliance is placed upon the rulings of this court in the cases of *Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267, and *Arkansas Valley etc. Co. v. Lincoln*, 56 Kan. 145. All of these cases are close to the border line dividing profits which may be allowed from those which should be rejected. In each of them, however, the business upon which profits were allowed was not new or untried, but had been established and carried on to such an extent in the community that a safe basis of calculation could be found. In *Hoge v. Norton*, 22 Kan. 374, profits were estimated on the cattle business, which is well established in Kansas, and is carried on to such an extent that the laws of feeding and growth are well understood, and the results reasonably certain. ⁶²⁵ In *Brown v. Hadley*, 43 Kan. 267, the business was dairying, which, it was said, has been extensively engaged in ever since the settlement of the state, and that, therefore, the gains could be estimated by men of experience in that business with reasonable certainty. In *Arkansas Valley etc. Co. v. Lincoln*, 56 Kan. 145, the breach of the contract resulted in breaking up an established business, and the profits that had been made for a reasonable period next preceding the time of the breach furnished a reasonably certain basis of calculating those

that would have been realized if no breach had occurred. All of these cases recognize the rule that uncertain and contingent profits are excluded by the law, and in them there is nothing to support the allowance of profits on a business entirely new in this section of the country, and where there is no basis upon which to determine whether any profit whatever would have been made. We think a safer and better rule may be found for measuring the damages, and in cases where they may be estimated in a variety of ways, that rule should be adopted which is most definite and certain. A just measure, and one which is conceded by the plaintiff in error, is the rental value of the idle factory, and, if it has no rental value, then interest on the money invested in the same, together with interest on any idle working capital which could not be used by reason of the violation of the contract. Considering the uncertainties attending the manufacture of glass in this state, we think the measure suggested is a safer standard for measuring the loss than the anticipated profits could be. The view taken that profits are not allowed in a case of this character is in accordance with the current of authority, but only a few of the cases will be cited: *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Todd v. Minneapolis etc. Ry. Co.*, 39 Minn. 186; *Poposkey* ⁶²⁶ v. *Munkwitz*, 68 Wis. 322; 60 Am. Rep. 858; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Benton v. Fay*, 64 Ill. 417; *Chicago City Ry. Co. v. Howison*, 86 Ill. 215; *Pennypacker v. Jones*, 106 Pa. St. 237; *Allis v. McLean*, 48 Mich. 428; *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. St. 167; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa, 524; *Bridges v. Lanham*, 14 Neb. 369; 45 Am. Rep. 121; *Rhodes v. Baird*, 16 Ohio St. 573; *New York etc. Min. Co. v. Fraser*, 130 U.S. 611; *Howard v. Stilwell etc. Mfg. Co.*, 139 U. S. 199; *Jones v. Call*, 96 N. C. 337; 60 Am. Rep. 416; *Brownell v. Chapman*, 84 Iowa, 504; 35 Am. St. Rep. 326.

The judgment of the district court will be reversed, and the cause remanded for another trial.

All the justices concurring.

DAMAGES.—THE LOSS OF PROFITS cannot be made the measure of damages for the breach of a contract, when the profits are speculative, conjectural, dependent on chances, or have no reference to the nature of the contract and the breach, nor when the damages largely exceed the contract price, unless such a result was within the contemplation of the parties. It is only when the loss is indisputable and the amount can be estimated with absolute certainty that a loss of profits forms the proper measure of damages: *Moulthrop v. Hyett*, 105 Ala. 423; 53 Am. St. Rep. 139, and note.

WESNER v. O'BRIEN.

[56 KANSAS, 724.]

MARRIAGE AND DIVORCE—LAND AS ALIMONY.—In divorce proceedings based on constructive notice to the defendant, and under a complaint alleging sufficient grounds for divorce and alimony, and praying that certain land of the defendant be awarded as alimony, the court may so award the land, provided it is within its jurisdiction and the notice to defendant contains a particular description of the land and the nature of the relief demanded.

MARRIAGE AND DIVORCE—LAND AS ALIMONY.—If an action for divorce is rightfully and properly brought in the county in which the plaintiff resides, any land belonging to the defendant within the operation of the laws of the state, no matter in what county situated, and which has been brought within the control and jurisdiction of the court by proper averment and notice, may be appropriated and awarded as alimony as an incident of the divorce proceedings.

J. C. Sheridan, for the plaintiff in error.

N. W. Wells, W. H. Browne, and B. F. Simpson, for the defendant in error.

⁷²⁴ JOHNSTON, J. This was an action brought by Enoch O'Brien to recover from George D. Wesner a tract of land situate in Miami county and the rents and profits of the same for a period of three years. Prior to June 18, 1875, the land was owned by O'Brien, and on that day, in a divorce proceeding brought by his wife, Annie O'Brien, it was decreed to her as alimony. Afterward, Annie O'Brien transferred the land to another, and Wesner derived his title from that source, and, about three years before the commencement of ⁷²⁵ the action, he took possession of the same and made substantial improvements thereon. More than fourteen years after the divorce proceedings, Enoch O'Brien began this proceeding, challenging the effect of the decree and the title of Wesner. On the trial, it appeared that the action for divorce was begun in Johnson county, and, as summons could not be served upon Enoch O'Brien within the state, service was obtained by publication, and in the notice it was expressly stated that she would ask judgment for the custody and control of an infant son, and that the tract of land in question should be decreed to her as alimony. The constructive notice was given in the manner prescribed by law, and the judgment awarding her the land as alimony was based solely upon constructive notice. On the trial of this cause, record evidence of the divorce proceeding and the decree appropriating the lands in question as alimony was excluded by the court, because it appeared that Enoch O'Brien had no other than constructive notice of the

proceedings, and because the land was not in the county within which the court was sitting. This ruling presents the controlling question of the case. It is conceded that constructive notice was sufficient to authorize a divorce of the parties, but it is contended that a decree terminating the marriage relation was the full extent of the jurisdiction and power of the court. The determination of the question depends to a great extent upon the statutes of the state, and that the state has full power, through its legislature and courts, to regulate and control the status of its citizens, and to dispose of or control real property, to whomsoever it may belong, within its limits, will hardly be denied. It is provided that service may be made by publication "in actions to obtain a divorce, ⁷²⁶ where the defendant resides out of the state," and "in actions brought against a nonresident of the state having in this state property sought to be taken by any of the provisional remedies or to be appropriated in any way." It is also authorized where the action relates to real or personal property in this state in which a nonresident defendant has or claims an interest, or where the relief demanded consists wholly or partly in excluding him from any interest therein: Civ. Code, sec. 72. These provisions, if valid, afford authority to dissolve the marriage relation upon constructive notice, and also to appropriate the real property of the nonresident defendant. In *Dillon v. Heller*, 39 Kan. 599, it is held that "Kansas is supreme, except so far as its powers and authority are limited by the constitution and laws of the United States. And within the constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the state which the constitution and laws of Kansas may give to them, and the mode of obtaining this jurisdiction may be prescribed wholly, entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of anything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

The same view has been expressed by the supreme court of the United States, where it is said: "The state through its tribunals may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them, and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens, and when nonresidents deal with them it is a legitimate and just exercise of ⁷²⁷ authority to hold and appropriate any property

owned by such nonresidents to satisfy the claims of its citizens": *Pennoyer v. Neff*, 95 U. S. 714.

In the exercise of this power, lands of nonresident owners are appropriated for the taxes assessed against them upon a publication notice only, mortgage and mechanics' liens are foreclosed against nonresident defendants where there is neither personal service nor appearance, and the property of nonresident defendants lying within the territorial jurisdiction of the court is subjected to the payment of claims and demands in a variety of ways without other service than by publication: *Dillon v. Heller*, 39 Kan. 599. It was, therefore, competent for the legislature to provide for the granting of a divorce upon constructive service, and, as alimony is an incident of divorce, it may be awarded in the same proceeding, if it is within the power of the court. Did the district court of Johnson county exceed its jurisdiction in decreeing the land in question as alimony? It had jurisdiction of the plaintiff, who was a resident of Kansas and of the county in which the action was brought. The child, whose custody she asked, but who died before the decree was rendered, was within the territorial jurisdiction of the court. The land sought to be appropriated as alimony was within the state and the operation of its laws, and subject to the control and disposition of its courts. The wife asked that this particular tract be subjected to the payment of her claim for support, definitely describing it in her petition, and setting out facts entitling her to alimony. That such relief was demanded was expressly stated in the publication notice, wherein the land was particularly described. In this way the land was brought before the court and subjected to its control. It is true, as the ⁷²⁸ authorities cited by the defendant in error show, that upon such a notice a judgment for money or one which could be enforced against the person of the defendant cannot be rendered. A court has no authority to render a judgment in personam without obtaining jurisdiction of the person of the defendant. Here, however, the land was brought within the control of the court in what was substantially a proceeding in rem. The complaining wife was here; the land sought to be subjected as alimony was here; she had an inchoate interest in the land, which possessed the element of property to such a degree that she could maintain an action during the life of her husband for its protection and for relief from fraudulent alienation by her husband: *Busenbark v. Busenbark*, 33 Kan. 572. It was necessary for the support of the wife, who was seeking a divorce, and the law provides that alimony may be awarded in

such cases. The land was subject to the laws of the state, and was within the reach of the proceedings and process of its courts. In such a case, we think the court has power not only to terminate the marriage relation, but to fix the custody and control of the children of the marriage who are before the court, and to appropriate as alimony any real property of the defendant within its territorial jurisdiction. It is true that there was no formal seizure of the property, but a seizure of land in such a case is little more than a form. The essential matter is, that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice which warns the defendant that one of the purposes of the proceeding is the sequestration of the land. It refers interested parties to the petition, in which the land is definitely described, and wherein it is asked that the land be set ⁷²⁹ apart as alimony. A formal seizure is no more essential to the jurisdiction of the court in a proceeding of this kind than in an action to quiet title to land based alone on constructive service, and in the latter case it was held that complete jurisdiction was acquired by the court without formal seizure and in the same manner as it was obtained in the divorce proceeding: *Dillon v. Heller*, 39 Kan. 599. The theory that the limit of the power of the court in a divorce suit where there is no personal service is the dissolution of the marriage does not obtain in this state. In the early case of *Lewis v. Lewis*, 15 Kan. 181, it was held that upon such service a decree barring the defendant of any interest in the plaintiff's property was valid and binding: See, also, *Chapman v. Chapman*, 48 Kan. 636. We cannot sustain the view of the court of appeals that the jurisdiction of the court in such a proceeding does not reach lands in a county other than where the court is sitting: *Wesner v. O'Brien*, 1 Kan. App. 416. The jurisdiction depends upon the domicile of the plaintiff, and not upon the location of the land sought to be appropriated as alimony. It must be brought in the county of which the plaintiff is a resident, and cannot be maintained unless the plaintiff has been an actual resident of the state in good faith for one year before the filing of the petition: Civ. Code, sec. 640. Alimony is an incident of the divorce proceeding, and, when the action is rightfully brought, any land within the operation of the laws of the state, and which has been brought within the control of the court, may be appropriated as alimony. The ancillary step in a divorce proceeding is not to be treated as an action brought to recover real estate or to determine an interest therein, and is not governed by the provisions of the code direct-

ing that such actions ⁷³⁰ shall be brought in the county wherein the land or some part thereof is situated. The divorce action may be brought where the plaintiff resides, and only one action is necessary, and, when it is properly brought, there is drawn to the court and within its jurisdiction any lands of the defendant sought to be appropriated as an incident of the divorce, wherever they may be situated within the state. If this were not the rule, how could lands of the defendant situated in different parts of the state be reached by a court granting the divorce upon either personal or constructive service? Must an action be brought in each county in which any of the land lies? And if so, must the plaintiff acquire a residence in each before the court can be invested with authority to award the land as alimony? We think that only a single action is required or authorized, and that any land within the state brought within the control of the court in the manner heretofore stated is subject to its jurisdiction and decree, without regard to county lines or boundaries.

For these reasons, the court of appeals erred in affirming the judgment of the district court, which will be reversed, with directions to grant a new trial of the cause.

All the justices concurring.

MARRIAGE AND DIVORCE.—LAND WAS SET OUT AS ALIMONY in the cases of *Wiggin v. Smith*, 54 N. H. 213, and *Burrows v. Purple*, 107 Mass. 428.

GODDARD v. HARBOUR.

[56 KANSAS, 744.]

JUDGMENTS—CONCLUSIVENESS OF SHERIFF'S RETURN.—A sheriff's return, reciting that he has served summons on the defendant personally, is conclusive between the parties in an action subsequently brought to enjoin the judgment based upon such service, on the ground that the court was without jurisdiction of the person of such defendant.

Action to enjoin a judgment on the ground that it was rendered without jurisdiction of the person of the defendant therein. Judgment for plaintiffs and defendants appealed.

Wheeler & Switzer, for the plaintiffs in error.

Madden Brothers, for the defendants in error.

⁷⁴⁵ ALLEN, J. A motion is made to dismiss this proceeding because the sheriff and Herbert E. Ball, who were parties in the

court below, are not made parties here. While they were proper parties in the district court, the sheriff had no interest in the litigation, but ⁷⁴⁶ was made a defendant merely because he held an order of sale issued on the judgment, which he was about to execute, and Ball is shown by the pleadings to have had no interest in the litigation, being merely the trustee named in the original mortgage. They are not necessary parties in this court.

The record presents squarely the question whether a sheriff's return as to matters concerning the truth or falsity of which he must know is conclusive on the parties to the suit. The sheriff in this case returned that he had served the summons on the defendants personally. He knew whether he had or had not done so. It is true that in this case the evidence of the sheriff, undersheriff, and Brown all shows that no service was made by the sheriff himself, but that a copy was delivered to John J. Harbour by the undersheriff, and whatever service was made on Frances J. Harbour was by Brown, concerning whose appointment as deputy prior to that time the evidence is conflicting. The sheriff has the right, however, to act through deputies, and is responsible for their doings to the same extent as for his own. While it would be better, perhaps, in all such cases to have the return show that the sheriff executed the process by the deputy, thus placing on record the exact truth, a return signed by the sheriff in his own name alone is undoubtedly sufficient where the service is actually made by a deputy. But the real question in the case is whether there may be any contradiction of the return outside of the record in the case itself. In England, it has been the established law from a very early day that the return is conclusive as between the parties, and that the remedy of a party injured by a false return is by an action against the sheriff on his official bond, in which case alone the truth or falsity of the ⁷⁴⁷ return may be inquired into: 19 Viner's Abridgment, 210; 6 Comyn's Digest, 242. In this country there is much diversity of judicial opinion on the subject, but the decided weight of authority seems to support the position that, as to matters falling within the personal knowledge of the sheriff, his return is conclusive as between the parties to the record, unless the falsity of the return is disclosed by some other portion of the record of the case: *Hunter v. Stoneburner*, 92 Ill. 75; *Cully v. Shirk*, 131 Ind. 76; 31 Am. St. Rep. 414; *Stewart v. Griswold*, 134 Mass. 391; *Green v. Kindy*, 43 Mich. 279; *Tullis v. Brawley*, 3 Minn. 277; *Stewart v. Stringer*, 41 Mo. 400; 97 Am. Dec. 278; *Bolles v. Bowen*, 45 N. H. 124; *Barrows v. National Rubber Co.*, 13 R. I. 48; *Gatlin v.*

Dibrell, 74 Tex. 36; White River Bank v. Downers, 29 Vt. 332; Stewart v. Stewart, 27 W. Va. 167; 22 Am. & Eng. Ency. of Law, 193. These cases hold that the return of the officer is conclusive on the question of jurisdiction. It is not necessary now to inquire how far the court may go in setting aside a service when challenged in the suit in which it is made before judgment. In this case, the only ground on which the judgment of the trial court can be maintained is, that the court was without jurisdiction to render the judgment in the prior action. The following cases seem to support the doctrine that a want of jurisdiction may be shown at any time, and that the return of the sheriff is only prima facie evidence of the facts stated: Dunklin v. Wilson, 64 Ala. 162; Watson v. Watson, 6 Conn. 334; Quarles v. Hiern, 70 Miss. 891; Pollard v. Wegener, 13 Wis. 569. The courts of Georgia and New York, while recognizing the existence of the general rule, hold that under the practice prevailing in those states the officer's return is not conclusive: Dozier v. Lamb, 59 Ga. 461; Ferguson ⁷⁴⁸ v. Crawford, 70 N. Y. 253; 26 Am. Rep. 589. It was said in the opinion in the last-mentioned case:

"The learned annotators of Smith's Leading Cases, Hare and Wallace (1 Smith's Leading Cases, 842), sum the matter up by saying: 'Whatever the rule may be where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance or a return of service by the sheriff in the record of a domestic court of general jurisdiction is absolutely conclusive, and cannot be disproved by extrinsic evidence.' It is quite remarkable, however, that, notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but, on the contrary, the great weight of judicial opinion and the views of some of our most distinguished jurists are directly opposed to it."

Counsel for defendants in error cite Bond v. Wilson, 8 Kan. 228, 12 Am. Rep. 466, Starkweather v. Morgan, 15 Kan. 274, Chambers v. King etc. Bridge Mfy., 16 Kan. 270, McNeill v. Edie, 24 Kan. 108, and Jones v. Marshall, 3 Kan. App. 529, as supporting the proposition that a sheriff's return may be disputed even in regard to personal service. In the cases heretofore decided by this court, the right to controvert the sheriff's return has been expressly limited to matters not coming within his personal knowledge, and the opinions in all the cases, including, al-

so, *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149, recognize this distinction.

We do not approve the rule declared in the opinion in the case of *Jones v. Marshall*, 3 Kan. App. 529, that a sheriff's return may be controverted as to matters falling within his ⁷⁴⁹ personal knowledge. Much can be said by way of argument for and against the rule which makes the sheriff's return conclusive. We deem it the safer course to yield our assent to a rule which has met with the approbation of so large a majority of the courts, and incline to the opinion that the weight of reason rests with that of authority. This case fairly illustrates the dangers and difficulties arising if the opposite rule is followed. Where there is a return of personal service, ordinarily the person served will be the only witness who can flatly contradict it, unless the officer himself does so. The service on John J. Harbour was entirely regular, and a summons was left at the residence of Frances J. Harbour, if not in fact handed to her in person as testified by Brown. To set aside and annul a judgment duly entered on such slight proof of what can hardly be termed more than a technical defect in the service is certainly establishing a bad precedent, and in our view a much more dangerous one than the rigid rule which we deem best to follow in this case. Under all the authorities, the proof required to controvert a sheriff's return must be clear and convincing. But if we were to permit an inquiry into its truth, we should be met in every case brought to this court by the other rule, that the decision of the trial court on the disputed question of fact is final. We should then rest under the necessity of affirming judgments like the one now under consideration, or of weighing conflicting testimony. The hardships which may possibly result from the rule adopted are not so great nor so probable as might at first appear, when it is considered that the sheriff acts under oath and is responsible on his official bond. If he makes a mistake, the court to which the process is returned may permit him to amend. The proceedings ⁷⁵⁰ of our district courts are matters of general notoriety. Judgments are not entered here as in New York by the clerk in vacation, but must always be taken in open court. In giving conclusiveness to a sheriff's return as to those matters coming within his personal knowledge, we do no more than give it the same credit as the parts of the record written by the clerk, any of which may be corrected under the direction of the court when application is duly made, but cannot be contradicted by parol testimony.

The judgment is reversed.

All the justices concurring.

SHERIFFS—VERITY OF RETURN.—A sheriff's indorsement upon a summons showing the date of its delivery to him must be taken as true and to import absolute verity until impeached by some adequate proceeding: *White v. Johnson*, 27 Or. 282; 50 Am. St. Rep. 726, and note. An officer's return to a writ is prima facie evidence even in his own favor: *State v. Devitt*, 107 Mo. 573; 28 Am. St. Rep. 440. An officer's return is usually conclusive upon the same parties in the same action and others in privity with them, but in other actions is prima facie evidence only: *Stewart v. Duncan*, 47 Minn. 285; 28 Am. St. Rep. 367, and note, with the cases collected.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

MARECK v. MUTUAL RESERVE FUND LIFE ASSN.

[62 MINNESOTA, 89.]

INSURANCE, LIFE—CONSTRUCTION OF POLICY—INCONTESTABLE CLAUSE.—A life insurance association issuing a policy providing that it does not assume the risk of the death of the insured if caused by his own hand, but that such condition may be waived in writing, and then providing that after five years from the date of the policy it shall be "incontestable from any cause" except nonpayment of dues or mortuary assessments if the age of the applicant is correctly stated, is liable for the full amount of the policy, if the insured commits suicide or dies by his own hand more than five years after the policy is issued, provided the insured has stated his age correctly, and all dues and mortuary assessments have been paid up to the time of his death.

Cobb & Wheelwright, for the appellant.

J. F. Byers, for the respondents.

40 MITCHELL, J. In August, 1886, the defendant issued to one Bofferding, plaintiffs' testator, a certificate or policy of life insurance for five thousand dollars, payable to his legal representatives within ninety days after receipt of satisfactory evidence of his death. Paragraph 9 of the policy, which was a printed form, reads as follows: "Death of the member by his own hand, whether voluntary or involuntary, sane or insane at the time, is not a risk assumed by the association in this contract, but in every such case there shall be payable, subject to all the conditions of this contract, a sum equal to the amount of the assessments paid by said member, with six per cent interest; but the board of directors or the executive committee of the association at its option may, in writing, waive this condition." Paragraph

11 provides that the policy is issued and accepted subject to the express conditions, among others, that if the insured should remain forty-eight hours in any place after yellow fever shall have been declared epidemic, and death shall ensue from that disease, or if he shall engage in certain specified hazardous employments, or engage in dueling, etc., and death shall result therefrom, then in every such case the contract shall be null and void, and all payments made thereon forfeited to the association. Written in red ink across the face of the policy, and forming a part thereof, was the following provision: "After five years from the date of this certificate it is incontestable for any cause, except nonpayment of dues or mortuary assessments at the times and place, and in the manner herein provided—the age of the member being correctly stated in the application for this certificate."

The age of the insured was correctly stated in his application for the certificate, and he duly paid all his dues and mortuary assessments up to the time of his death. In September, 1893, while the policy was in full force, and more than five years after the date of the certificate, the insured came to his death by his own hand. The only question in the case is, whether the company is bound to pay the five thousand dollars, or only a "sum equal to the amount of the assessments paid by said member, with six per cent interest."

Defendant's contention is, that the contract contemplates two separate and distinct risks—death by suicide, and death from any other cause; that in the latter case it promised to pay five thousand dollars, and in the former only the amount of premiums paid, with interest; ⁴¹ that the "incontestable clause" is inapplicable, because the company is not contesting the policy, but only proposing to pay according to its terms; that death by suicide was not a risk which they assumed, except to the extent of the premiums paid, with interest.

While the literal language of the contract lends an air of plausibility to this argument, yet we do not think it is sound. There is nothing in the policy contemplating two distinct and separate risks. The assured applied for an insurance on his life of only one sum, viz., five thousand dollars. The amount for which the policy was issued was five thousand dollars, payable at his death, but coupled with numerous conditions, the breach of any one of which, if not waived, relieved the insurer from liability. Counsel for defendant admits, correctly, and, no doubt, advisedly, that if death had occurred from any of the causes enumerated in the eleventh paragraph, the "incontestable clause"

would have applied. But these risks were no more assumed by the company than was death by suicide. If not waived, death from any of them would have forfeited the right of the beneficiary to the five thousand dollars—the amount of the insurance. The only difference would have been that, in case of death from any of the causes named in the eleventh paragraph, the beneficiary would have had no claim either to the sum insured or for the refunding of the premiums paid, whereas, in the case of death by suicide, while the five thousand dollars would be forfeited, the company would be bound to refund the premiums. Except in this one particular, there is no essential difference between the conditions of paragraph 9 and of paragraph 11. In both cases the breach of the condition forfeits the five thousand dollars.

There are two or three elementary rules of construction that are peculiarly applicable to contracts of this class. They are to be liberally construed in favor of the insured, so as not to defeat, without plain necessity, the object of the policy; and, if there is a doubt as to the meaning of terms in the policy excepting the insurer from liability, they are to be construed most strongly against him. As is said in one case: "That is the true meaning of my contract which I desire the other contracting party to put upon it; not that which, in my own favor, I wrap up in general phrase."

If there is a reasonable doubt as to the extent of the application of the "incontestable clause," it must be solved in favor of the beneficiary. This clause was inserted in the contract by the company ⁴² itself. Being written across the face of the policy, it was presumably the last expression of the agreement of the parties, and the one most in mind at the time of its execution. It was written there for a purpose. That purpose was to provide that the policy should be incontestable for any cause after five years, subject only to two conditions: One was that the age of the insurer had been correctly stated in his application. The other was that his dues and mortuary assessments should be duly paid. It seems to us that the average mind would understand this as meaning just what it says, and that it would apply to death from suicide as well as death from the causes specified in paragraph 11. The policy said that the association might waive the condition as to suicide, and it would naturally be understood that by this clause the company agreed to waive it after five years. To the layman the present contest would, as plaintiff's counsel suggests, appear very much like a contest over an in-

contestable policy. Another reason why the insured might well understand the clause as meaning this, and why the company itself may have intended it to have that meaning, is the fact that it is the custom of many life insurance companies to limit the operation of conditions as to suicide to a fixed period, and to make their policies thereafter incontestable on that ground: See 13 Encyclopedia Britannica, 179. Our conclusion is, that the construction placed upon the policy by the trial court was correct.

Judgment affirmed.

INSURANCE—LIFE—INCONTESTABLE CLAUSE.—A provision to the effect that the validity of the policy should not be questioned after the death of the insured and not after two years from the date of its issue is considered and sustained as excluding the defense of fraud as well as other defenses in the case of *Wright v. Mutual Ben. Assn.*, 118 N. Y. 237; 16 Am. St. Rep. 749.

HOWE v. MINNEAPOLIS, ST. PAUL, AND SAULT SAINTE MARIE RAILWAY COMPANY.

[62 MINNESOTA, 71.]

NEGLIGENCE—DUTY TO LOOK AND LISTEN.—A mere passenger in a vehicle, with no control over the driver or his management of his team, and with no knowledge that he is careless or incompetent, is not without more, and as matter of law, guilty of negligence in failing to look and listen when approaching a railway crossing, so as to bar his right to recover in case he is injured by a collision.

NEGLIGENCE—DUTY TO LOOK AND LISTEN.—A passenger riding by invitation in a vehicle owned and driven by another, over whom he has no control, without any relation of master and servant, or principal and agent between them, and without being engaged in any joint enterprise and without knowledge on the part of the passenger that such driver is careless or incompetent, is not guilty of negligence per se in failing to look and listen for an approaching train at a railway crossing; and, if he is injured in a collision at such crossing, the question of his contributory negligence is for the jury to determine.

A. H. Bright, G. B. Young, and M. B. Koon, for the appellant.

Welch & Welch and J. W. Arctander, for the respondent.

73 MITCHELL, J. This was an action to recover for personal injuries sustained by plaintiff in a collision between a farm wagon, on which he was riding, coming from the north, and one of defendant's trains coming from the west. The collision occurred about 10 o'clock in the morning of December 29, 1892,

at the crossing of the Osseo road with defendant's main line near Minneapolis. The trial ⁷⁶ resulted in a verdict for the plaintiff for twenty thousand dollars, which the court, with plaintiff's consent, reduced to fourteen thousand five hundred dollars. This appeal is from an order denying defendant's motion for a new trial.

The negligence charged against the defendant was running its train at an unlawful and dangerous rate of speed and failing to give the required signals as it approached the crossing. It is not questioned but that the evidence was sufficient to justify the jury in finding that the defendant was guilty of negligence as alleged. Defendant's two contentions are: 1. That the verdict is excessive; and 2. That it conclusively appears that the plaintiff himself was guilty of contributory negligence in failing to look and listen for trains as he approached the crossing.

1. The verdict, even as it now stands, is large, but it is clearly not so disproportionate to the nature and extent of plaintiff's injuries as to warrant us in setting it aside as excessive. Plaintiff was a young man, in his best years, and his injuries are both serious and permanent, leaving him badly maimed and deformed for life. Indeed, it would be no exaggeration to say that the evidence would justify the conclusion that he is practically a physical wreck.

2. On the occasion in question, the plaintiff was riding with one Pomeroy, who owned and was driving the team and wagon. Pomeroy had overtaken him on the highway, and invited him to ride. The vehicle was a farm wagon with a box or rack nearly three feet high. The team was a gentle one, and in approaching the crossing, was traveling at the rate of about three miles an hour. Plaintiff had no control over the team, or over Pomeroy in its management. There was no relation of master and servant or of principal and agent between them, nor were they engaged in any joint enterprise. Plaintiff was simply taking a gratuitous ride upon the invitation of the owner and driver of the team. Pomeroy, who was driving, and a young man named Wentworth, sat on a spring seat, set on the bottom of the wagon box in the front left-hand corner, facing toward the west. Plaintiff, as they approached the crossing, was standing up near the center of the wagon on the right-hand side, and facing toward the team. The sight and hearing of all three were unimpaired. The road being bare of snow, the wagon made some noise, but not sufficient, as they testified, to interfere with their hearing. The morning was cold and frosty, with ⁷⁷ a light wind from the east. All three

were familiar with the crossing, and plaintiff was aware of the fact that they were approaching it. There was no evidence that Pomeroy was not a competent driver. Neither was there any evidence that plaintiff knew or had reason to suppose that Pomeroy was not exercising proper care in looking and listening for approaching trains; certainly none that required a finding that he did. There were no exceptional circumstances that would have excused a traveler driving a team from looking for approaching trains. Neither did anything exceptional occur to divert the attention of one whose duty it would otherwise have been to look.

Plaintiff's testimony, which was the only direct evidence of what he did, was that he did look to the west for approaching trains when he was about two hundred and twenty-five feet from the crossing; that, seeing none, he turned and looked to the east, and, seeing none in that direction, he again looked to the west when he was about one hundred and fifty feet from the crossing; that, still seeing no train in that direction, he again looked to the east, when his attention was attracted to smoke, which he thought perhaps might come from a locomotive, but which proved to be from the smokestack of a factory near Camden Place; that, becoming satisfied that this was not from a train, he turned around to again look to the west when he was about twenty-five feet from the track, when he discovered the approaching train within from one hundred to one hundred and fifty feet of the crossing, and going at a rate of from forty to fifty miles an hour; that just at this time the horses made a jump or "lunge" forward; that Pomeroy tried to check them, but could not; that he (plaintiff) made an effort to get hold of the lines, but failed, and in an instant the collision occurred, and the next thing he knew was when he regained consciousness in the hospital.

It is quite apparent from the evidence that the horses were the first to discover the approach of the train, and that neither of the three men in the wagon discovered it until it was almost on the crossing, and the horses within a few feet of the railroad track, when, in their fright, they sprang forward on the track, almost immediately in front of the engine. The highest rate of speed of the train testified to was from forty to fifty miles an hour. The evidence consists largely of measurements and experiments made by the witness as ⁷⁸ to the distances at which a train coming from the west could be seen from different points on the highway by a traveler coming from the north, also, of photographs illustrative and explanatory of this evidence. It is impossible to state on paper, at least in any reasonable space, any-

thing like the full probative force of the evidence. But a careful examination of it satisfies us that it amounts to a mathematical demonstration that had plaintiff, when at the distance of one hundred and fifty feet from the crossing, looked west up the track for an approaching train, he would and must have seen the train, conceding that it was running at the highest rate of speed testified to; also, that the view westward up the track was unobstructed for so long a distance that if he had looked in this direction from any point within one hundred and fifty feet of the crossing he would have seen the train. Hence, although he testifies that he did look at the distance of one hundred and fifty feet, it must be considered as conclusively established that he did not look, at least with the vigilance required of one driving a team, notwithstanding the "fog and mist" attempted to be raised for the purpose of showing that he might have looked and not seen the train. Moreover, if he had been the driver of the team, even if he had looked at a distance of one hundred and fifty feet, it would have been negligence for him not to look again, when, as in this case, there was nothing to prevent his doing so.

The evidence conclusively established negligence on the part of Pomeroy; and if the same kind and degree of negligence in "looking and listening" was required of plaintiff, in the exercise of reasonable care, as was required of Pomeroy, the driver, then plaintiff was, as a matter of law, guilty of contributory negligence, and the verdict cannot be sustained.

Defendant's contention is, that the rule requiring a traveler on a highway, on approaching a railroad crossing, to "look and listen," so as to avoid danger from an approaching train, is, to its full extent, as applicable to one who is being carried in a vehicle owned and driven by another as it is to the driver, who has the control and management of the team, although the passenger has no control over the driver or the management of the team, and although no relation of principal or agent or master and servant exists between the two, so that the doctrine of respondeat superior would apply, or although they are not engaged in a joint enterprise, so as to ⁷⁹ create a mutual responsibility for the acts of each other. We do not think that this is, or on principle, ought to be, the law.

Negligence means merely the want of ordinary or reasonable care according to circumstances. This court, in common with most courts, has held, as a matter of law, that reasonable care requires a traveler driving along a highway, when approaching a railroad crossing, to use his senses by looking and listening to

discover and avoid danger from approaching trains. Under exceptional circumstances, there may be exceptions even to this rule. But the degree of care which an ordinarily prudent and cautious man usually exercises will depend somewhat upon the responsibility which is cast upon him. And it does not seem to us that, because reasonable care makes it the absolute duty of the person who has the control of the team and vehicle to look and listen, it necessarily follows that reasonable care imposes the same absolute duty upon one riding in the vehicle, but who is not intrusted with the control and management of the team, and has no control over the person who has. Of course, the fact that the passenger, who has no control over the team or driver, is not chargeable with the negligence of the driver, does not relieve him of the duty to exercise reasonable care to avoid danger. The fact that he is not responsible for the driver's negligence will not relieve him from responsibility for his own negligence. But the question is, What constitutes negligence, and what is the standard of reasonable care on the part of one situated as was this plaintiff?

If plaintiff had known that Pomeroy was an incompetent driver, or had known or had reason to believe that he was not performing his duty by looking for approaching trains, and had nevertheless neglected to look for himself, he would undoubtedly have been guilty of negligence. Or if he had in some way actively participated in Pomeroy's negligence, he would have been negligent. But that is not this case, or at least the evidence does not establish it. We think that it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, who he had no reason to suppose was neglecting his duty, that he was required, when approaching a railway crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team. And our conclusion is, that a court cannot hold, as a matter of law, ⁸⁰ that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in "looking and listening" on approaching a railroad crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that under ordinary circumstances passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting a

hard and fast rule that they are guilty of negligence in doing so. Every case must depend largely upon its own particular facts.

The authorities on this precise point are not as numerous as might be expected. In many of the cases where the driver or person in charge was negligent, the injured passenger was within an inclosed carriage or car, and hence had no opportunity to look or listen for approaching trains. It is, however, a noticeable fact than in most of the cases which repudiate the doctrine of *Thoroughgood v. Bryan*, 8 Com. B. 115, and hold that the negligence of the driver in failing to "look and listen" is not imputable to the passenger, it does not appear that the passenger himself looked and listened, and no suggestion is made that any such absolute duty devolved upon him.

Brickell v. New York etc. R. R. Co., 120 N. Y. 290, 17 Am. St. Rep. 648, seems to go as far toward sustaining defendant's contention as any case in the books. But the facts of that case were peculiar. The plaintiff and the driver both occupied the same seat in a top buggy. As it was snowing and blowing, they raised the top, which was all inclosed except the front. This, with the snow and wind, rendered it more difficult either to see or hear approaching trains. This condition of things was necessarily known to plaintiff, who knew of the crossing. The court held that the evidence failed to show that plaintiff himself was free from negligence, which, under the rule in that state, he is bound to prove as part of his cause of action. This was decisive of the case, but the court proceeded, and further held that the evidence affirmatively and conclusively proved the actual existence of negligence of both the driver and the plaintiff. Upon the facts, this might well have been held upon the ground that the plaintiff himself actively participated in the negligence, and what the court said beyond this was not necessary ⁸¹ to the decision of the case. That the trial courts of that state do not understand this case as laying down any such absolute rule as is sometimes supposed is evident from *Crawford v. Delaware etc. R. R. Co.*, 54 N. Y. Super Ct. 262. In that case the plaintiff sat on the back seat of a carriage, while her mistress sat on the front seat and drove. The plaintiff neither looked nor listened for approaching trains, and yet it was held that her negligence was a question for the jury: *Crescent Township v. Anderson*, 114 Pa. St. 643; 60 Am. Rep. 367; and *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, are sometimes cited in support of the doctrine now contended for by the defendant. In the first of these cases, the plaintiff himself actively participated

and united in the negligent act. And in *O'Toole v. Pittsburgh etc. R. R. Co.*, 158 Pa. St. 99, 38 Am. St. Rep. 830, the court says that in both of these cases "the decision was put on the ground that the negligence of the driver of the horse was apparent [to the plaintiff], and he was to some extent under the direction or control of the party injured."

Some courts make a distinction between private conveyances and public conveyances operated by common carriers, but it seems to us that any distinction based on this ground alone is wholly indefensible on principle. Others seem to make the position of the passenger the test, holding, impliedly at least, that when he is seated away from the driver by being separated from him by an inclosure, or by being inclosed in the carriage, is without opportunity to discover danger, or to inform the driver of it, the rule of "looking and listening" does not apply to the passenger, but that otherwise it does. The presence or absence of these circumstances may be, and usually would be, material evidence upon the question of the passenger's negligence, but to hold as a matter of law, and as a rule of universal or even general application, that in their absence the passenger is guilty of contributory negligence if he does not "look and listen," is, in our opinion, not justifiable upon either principle or reason. The circumstantial evidence in this case may tend quite strongly to prove that plaintiff, as well as the driver, was negligent, but that was a question of fact for the jury. A court would not be justified in holding that his negligence was conclusively established. If the court in its charge instructed the jury too ⁸² strongly in defendant's favor on this question, it is not a matter of which it can complain.

Defendant's exceptions to the charge of the court are unavailing: 1. Because not seasonably taken before the jury retired; and 2. Because they are, or at least most of them are, too general, being taken to parts of the charge involving two or more distinct propositions, some of which, at least, were unexceptionable, and the particular proposition objected to was not specified. We may, however, add that, while many of plaintiff's requests might have been properly refused on the ground that they were too long and involved to furnish much aid to the jury, yet we discover no prejudicial error in any of them. The assignments of error relating to the admission of evidence and to the refusal of the court to grant a new trial on the ground of newly-discovered evidence, are, in our opinion, all without merit.

Having arrived at the conclusion that plaintiff's contributory negligence was a question for the jury, and that the evidence was

sufficient to justify the verdict, the result is, that the order appealed from must be affirmed.

MR. JUSTICE COLLINS DISSENTED, saying that although he did not regard the verdict as reduced by the court as excessive, yet he was of opinion that under the facts in the case the court should have determined, as matter of law, that the contributory negligence of the plaintiff was conclusively established by the evidence, and that it should have charged the jury, as requested, that the plaintiff could not recover any damages. In support of this view of the law, the learned judge cited *Crescent Tp. v. Anderson*, 114 Pa. St. 643; 60 Am. Rep. 367; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733; *O'Toole v. Pittsburgh etc. R. R. Co.*, 158 Pa. St. 99; 38 Am. St. Rep. 830.

NEGLIGENCE—CONTRIBUTORY OF THIRD PERSON.—When a person himself without fault is injured by the negligence of a turnpike company while riding in a private conveyance, over which he has no control and which is in charge of the owner, the latter's negligence will not defeat a recovery by such injured person: *Brannen v. Kokomo etc. Road Co.*, 115 Ind 115; 7 Am. St. Rep. 411; *Township v. Anderson*, 114 Pa. St. 643; 60 Am. Rep. 367. One who is injured by the joint negligence of a private person with whom he is riding by invitation and a third person is not chargeable with the negligence of the driver: *Borough v. Brisbane*, 113 Pa. St. 544; 57 Am. Rep. 483. One who is riding by invitation in a vehicle in charge of another and remains in it with knowledge that it is approaching at a fast trot a crossing where a train is about due without keeping any lookout himself, and with no request to the driver to stop, is guilty of contributory negligence: *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 743.

RYDER v. KINSEY.

[62 MINNESOTA, 85.]

NEGLIGENCE—QUESTION OF LAW OR FACT.—If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question of negligence is one for the jury; otherwise, it is for the court.

NEGLIGENCE—DANGEROUS PREMISES.—While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care enables him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it.

NEGLIGENCE—DANGEROUS PREMISES—LATENT DEFECTS—BURDEN OF PROOF.—If a building falls without apparent cause, in the absence of explanatory circumstances, negligence is presumed, and the burden of proof is on the owner to show that he exercised ordinary care to keep it in a safe condition, but if such explanatory circumstances show that the cause of the fall of the building was a latent defect in its construction, and there is nothing to connect such cause with the owner's negligence, the burden of

proof is upon the party asserting such owner's negligence, to show that such cause might have been discovered and removed by the exercise of ordinary care on the part of the owner.

NEGLIGENCE—DANGEROUS PREMISES—LATENT DEFECTS.—If the cause of the fall of a building is a latent defect in its construction, which could not have been discovered by the exercise of ordinary care in inspecting the building, the owner cannot be held liable for an injury caused by such fall.

C. N. Akers and D. D. Williams, for the appellant.

Batchelder & Batchelder, for the respondent.

86 **START, C. J.** Action to recover for personal injuries sustained by the plaintiff's minor son, Charles Ryder, caused by the falling of a brick-veneered wall of a building owned by the defendant. On the trial, after the plaintiff had closed his case, the court directed the jury to return a verdict for the defendant, for the reason that the plaintiff had failed to establish his cause of action. The plaintiff appeals from an order denying his motion for a new trial.

The plaintiff's evidence tended to establish the following facts: In 1885, the defendant purchased a lot on Fifth street, in the city of St. Paul, upon which stood a one-story brick-veneered building, which he has ever since leased for store and office purposes. The last lease made by him was in the spring of 1894 to the present tenants. On June 27, 1894, about midnight, Charles Ryder, nineteen years **87** of age, in company with McMahan, a boy about his own age, was walking along Fifth street, and saw a policeman in front of the building, who was trying to take down a sign therefrom, which hung over the sidewalk. This sign was about three and one-half feet square, made of oil cloth, with a light wooden frame. It had been suspended by two small iron hooks from a piece of timber, two by four inches, extending from the front of the building over the sidewalk, and supported by two guy wires attached to its outer end, and fastened to the sides of the building. It does not appear that it was attached in any way to the part of the wall which fell. The outside hook had become detached from the sign (presumably by a severe storm in the early part of the evening), so that it hung by the one hook. The policeman informed the young men that he feared the sign would fall upon persons passing, and asked them to assist him in taking it down. They assented, and, after striking and pushing the sign with a stick, the policeman and Ryder raised McMahan up, holding him by the legs, and he gave the sign a twist to detach it from the remaining hook, and at that very instant the whole front of the building above the door and windows fell, crushing

Ryder to the sidewalk, breaking his pelvic-bone, and otherwise seriously injuring him.

The building was some thirteen feet wide, and fifteen feet high to the peak of the roof. There was a lintel eight by eight inches over the openings in front, and a four-inch brick wall, the one that fell, extended above the lintel as high as the peak of the roof. In the rear of this brick wall were six pieces of timber two by four inches, fastened together so as to make three pieces four by four inches, one at each corner and one in the center; and between these there were studding two by four inches, about two feet apart. There was no sheeting on the outside of the studding next to the brick, but there was on the inside. The brick-veneered wall was not spiked to the studding or sheeting, or anchored to the frame in the customary manner, or attached to them in any way, or otherwise supported. There was fastened to the outside of the wall, and fell with it, a large wooden sign five by thirteen feet, which was upon the building when defendant purchased it. Practically, there was no change in the construction of the building or its condition from the time the defendant bought it until the wall fell. The evidence further tends to show that the customary and proper ⁸⁸ way to support a veneered brick wall is to sheet or board up the frame on the outside of the studding next to the brick, then lay the brick along and outside of the sheeting, and bind the brick wall, during the progress of its construction, to the frame of the building, by driving twenty-penny nails every fifth or sixth course of the bricks into the boards of which the sheeting is composed, so that the nail heads will remain in the mortar at about the center of the bricks. This is what is meant by "anchoring" or "supporting" a brick or veneered wall. These defects in the construction of the wall were discovered after it fell, but there was no evidence in the case as to whether such defects could or could not have been discovered by the exercise of ordinary care on the part of the owner before the wall fell, except as may be inferred from the facts we have stated.

Upon this evidence, was the question of the defendant's negligence in the premises one of law or fact or for the jury? If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question was one for the jury; otherwise it was for the court. If there is a fair doubt as to the inferences to be so drawn, the question is one of fact: *Abbett v. Chicago etc. Ry. Co.*, 30 Minn. 482.

The law applicable to this branch of the case is well settled.

While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing the premises: *Nash v. Minneapolis Mill Co.*, 24 Minn. 501; 31 Am. Rep. 349; 2 *Shearman and Redfield on Negligence*, sec. 702; 1 *Wood on Nuisances*, sec. 109. Buildings properly constructed do not fall from slight causes, but fall only from some adequate cause. Therefore, where a building falls without apparent cause, in the absence of explanatory circumstances, negligence will be presumed; and the burden is upon the owner of showing that he exercised ordinary care to keep it in a safe condition: *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530; 1 *Shearman and Redfield on Negligence*, secs. 59, 60; 2 *Thompson on Negligence*, 1231.

In the case under consideration, the evidence as to what was done by the plaintiff and those with him in taking down the small, ⁸⁹ light sign from the building in question would certainly justify the jury in finding that such act was not an adequate cause for the falling of the wall. The presumption, then, would be, in the absence of explanatory circumstances, that the wall fell because it was in an unsafe condition, and that the defendant was negligent in not exercising ordinary care in properly inspecting and keeping it in repair. But it is only in the absence of explanatory circumstances as to the cause of the fall of a building that the presumption of negligence on the part of the owner is presumed *prima facie*. Therefore, where such explanatory circumstances are given in evidence, and the cause of the fall of the building is established, and there is nothing in the evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to give evidence tending to show that such cause might have been discovered and removed by the exercise of ordinary care on the part of the owner. The cause of the fall of the wall is clearly established in this case. It fell because of a defect in its construction, in that it was not supported in the usual manner. This was readily discovered after the accident, when the bricks were on the sidewalk, and the manner of constructing the wall was exposed.

It is easy to be wise after the fact, but the question is, "Did the defendant know, or might he have known, by the exercise of ordinary care, before the accident, of the defect in the construction? If so, he would have been clearly negligent in the prem-

ises. But he did not build the wall, and there is no evidence in the case that there was anything in the external appearance of the building indicating its defective construction. On the contrary, it affirmatively appears by the uncontradicted evidence that the defect in the construction was a concealed one. Neither is there any evidence in the case tending to show that the defect could have been discovered by the exercise of ordinary care in inspecting the building. The *prima facie* presumption arising from the undisputed facts is, that the defect could not have been discovered by the exercise of such care; for the sheeting on the inside of the studing and the brick wall on the outside of them concealed the defect, and the absence of sheeting next to the brick wall and the anchoring of it to the sheeting by the large nails could not have been discovered, by any means disclosed by the evidence, except by the exercise of extraordinary ⁹⁰ care in inspecting the building, by making openings in the sheeting or wall to discover whether or not the wall was properly supported. Ordinary, not extraordinary, care, was the measure of the defendant's duty in the premises. No importance can be attached to the fact that the large sign was fastened to the brick wall, for, assuming that the wall was properly constructed, it could not be negligence to fasten the sign to it, and there was nothing about the sign or the manner in which it was attached to the wall to indicate the latent defect in the wall.

Upon the whole record, we are satisfied that the presumption of negligence arising from the mere fact that the wall fell was rebutted by the explanatory circumstances disclosed by the evidence, showing the cause of its fall, and that the defect was a latent one; and that, in the absence of any evidence disclosing any fact or circumstance from which it might be reasonably inferred that such defect could have been discovered by the exercise of ordinary care on the part of the defendant, the question of his negligence is not one admitting of a fair doubt, and that the jury were correctly instructed to return a verdict for him. Any other rule would practically make owners of buildings insurers of their safety.

Order affirmed.

NEGLIGENCE—QUESTION OF LAW OR FACT.—If different minds may draw different conclusions from the facts in evidence to support a charge of negligence, it is a question of fact to be determined by the jury and not of law for the court to decide: *Pray v. Omaha etc. Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717; *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and especially note; *Tetherow v. St. Joseph etc. Ry. Co.*, 98 Mo. 74; 14 Am.

St. Rep. 617, and note; but if the evidence in a cause is plain and positive, admitting of no doubt or controversy, the question of negligence is a question of law for the court: *Harris v. Cameron*, 81 Wis. 239; 29 Am. St. Rep. 891, and note.

LANDOWNERS—LIABILITY FOR DEFECTIVE PREMISES.—If the owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended: *Hart v. Washington Park Club*, 157 Ill. 9; 48 Am. St. Rep. 298, and note. To the same effect see *Pelton v. Schmidt*,*104 Mich. 345; 53 Am. St. Rep. 462. This question is fully discussed in the extended notes to *Plummer v. Dill*, 32 Am. St. Rep. 467, and *McAlpin v. Powell*, 26 Am. Rep. 562.

HEDIN v. MINNEAPOLIS MEDICAL AND SURGICAL INSTITUTE.

[62 MINNESOTA, 146.]

FRAUD.—ACTION FOR DECEIT can be maintained only when it is shown that a false representation of a material fact has been fraudulently made with intent to deceive, and in ignorance relied upon, and that damage has resulted therefrom.

FRAUD.—FALSE REPRESENTATIONS RELIED UPON, TO BE ACTIONABLE, must be as to a material fact susceptible of knowledge, and generally, if they appear to be mere matters of opinion or conjecture, they are not actionable.

FRAUD.—LIABILITY FOR FALSE REPRESENTATIONS may arise if one has, or assumes to have, knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies.

FRAUD.—LIABILITY FOR FALSE REPRESENTATIONS.—A false statement of opinion as to a subject on which one party has special knowledge, while the other party is ignorant and relies thereon to his damage, if made fraudulently, renders the person giving the opinion liable in an action for deceit.

FRAUD.—FALSE REPRESENTATIONS.—An action for deceit lies though defendant made the false representations as agent for another.

FRAUD.—DECEIT FOR FALSE REPRESENTATIONS.—An action for deceit may be maintained although the parties entered into a contract procured by false representations upon which the action is based.

C. G. Laybourn, for the appellants.

W. A. Lancaster, for the respondent.

¹⁴⁷ **COLLINS, J.** This is an action for deceit. Defendant institute is a corporation, while defendant Lawrence is its president, the physician and surgeon in charge, and the person with whom plaintiff dealt, and to whom he paid the sum of five hundred dollars for medical treatment, which sum he alleges was ob-

tained by defendants through false and fraudulent representations to him that the certain injuries from which he was then suffering were curable, and that at the institute they could and would cure him for that amount of money. No question has been made as to the sufficiency of the complaint. Plaintiff had a verdict for five hundred dollars and interest, and defendants severally appeal from an order refusing a new trial.

Thirty-seven errors have been specified in appellant's brief, nearly all relating to the rulings of the trial court when the evidence was being taken. We have examined these specifications of error with care, and, notwithstanding the elaborate argument and evident sincerity of defendant's counsel, we are compelled to say that very few are entitled to special reference. The real question in the case is as to the sufficiency of the evidence to support the verdict, and this depends mainly on an inquiry as to whether the statements and representations alleged to have been made, and said to have been relied upon, were actionable. According to the evidence, these were made by defendant Lawrence, and were to the effect that the plaintiff's injuries could be cured, and that he could and would be ¹⁴⁸ made sound and well if he placed himself under treatment at the institute. Counsel for defendants contends that, at most, these statements were but expressions of opinion as to matters contingent and uncertain in their very nature, not susceptible of certain determination or of actual ascertainment; therefore no action as for deceit can be maintained upon them.

To sustain such an action, it must be shown that a false representation of a material fact has been made, in ignorance relied upon, and that damage has ensued. The representation must be fraudulently made, an intention to deceive being a necessary element or ingredient. But positive proof that a party knew his representation to be untrue is not essential. The intention may be proved by showing that, having no knowledge of the truth or falsity of his statements, he did not believe them to be true, or by showing that, having no knowledge of their truth or falsity, yet he represented them to be true of his own knowledge. When the knowingly false assertion is as to the belief of a party, or is as to his knowledge of the fact he assumes to announce, intent to deceive is the inevitable inference. If this defendant Lawrence (having no knowledge of the truth or falsity of his statements, and not believing them to be true) made statements and representations to plaintiff that his injuries were curable, and that with treatment he could become a well and sound man, or if he made such statements, having no knowledge of their truth or fals-

ity, yet representing that they were true, the intent to deceive is as well established as if positive knowledge of their untruthfulness had been proven. Generally speaking, the representations must be as to a material fact, susceptible of knowledge; and, if they appear to be mere matters of opinion or conjecture, they are not actionable. There are many cases, however, in which even a false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth. And for a false statement ¹⁴⁰ of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie: *Gordon v. Butler*, 105 U. S. 553; *Robbins v. Barton*, 50 Kan. 120; *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377; *Hicks v. Stevens*, 121 Ill. 186; *Cooley on Torts*, 483.

Take the facts in the case at bar. The plaintiff, an illiterate man, badly injured in an accident, and physically a wreck, consulted with the physician and surgeon in charge of a medical and surgical institute or hospital as to his condition and the probability of a recovery. After an examination by the surgeons, he was positively assured, if he told the truth as to what was said (and the jury found that he did), that he could be cured, and by treatment at that institute could and would be made sound and well. Considering the circumstances, and the relations of the parties, there was something more in defendant's statements than the mere expression of his opinion upon a matter of conjecture and uncertainty. It amounted to a representation that plaintiff's physical condition was such as to insure a complete recovery. The doctor, especially trained in the art of healing, having superior learning and knowledge, assured plaintiff that he could be restored to health. That the plaintiff believed him is easily imagined; for a much stronger and more learned man would have readily believed the same thing. The doctor, with his skill and ability, should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year's standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can be effected. If he cannot speak with certainty, let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement

that he can cure, and does not believe the statement true, or if he has no knowledge of the truth or falsity of such a statement, but represents it as true of his own knowledge, it is to be inferred that he intended to deceive. The deception being designed in either case, and injury having followed from reliance upon the statements, an action for deceit will lie.

The evidence in this case was sufficient to warrant the jury in finding that plaintiff had sustained a fracture at the base of the skull, and that his injuries were incurable; that, after examination, defendant Lawrence stated and represented that the plaintiff could ¹⁵⁰ and would be restored to health by treatment; and that he made such statements and representations for the purpose of inducing plaintiff to pay over the sum of five hundred dollars to himself, or to the institute, or both. There was evidence from which the jury could find that he made these statements and representations without knowing whether they were false or true, not believing they were true, and also that he made them without knowing their truth or falsity, but representing them to be true of his own knowledge. There was also evidence from which the jury could have found that the physicians and surgeons who made the examination at the institute (Lawrence and another) knew that plaintiff had sustained a basal fracture of the skull, and that he could not recover his health. The evidence was abundant in support of the verdict.

Counsel makes the point that, as to defendant Lawrence, the action should have been dismissed, because he, as the president of the defendant institute, was simply acting for it as its agent. We are not aware of any rule of law which will excuse and absolve a person from the consequences of his own wrong because he happened to be the agent of another at the time of the perpetration of the wrong. It is also urged that the action cannot be maintained, because of the written contract between the parties. There is nothing in this; for the action is not upon the contract, nor is it controlled by its terms and conditions. It is an action for fraud and deceit practiced upon the plaintiff, through and by means of which the contract was obtained.

Order affirmed.

FRAUD—ACTION FOR.—The gravamen of an action for deceit is actual intentional fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant, when he made it, knew that it was false: *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651, and note. A mere expression of belief or opinion as to the quality or value of articles sold, though false, cannot be made the basis of an action for deceit, in the absence of either fraud or

warranty; *Handy v. Waldron*, 18 R. I. 567; 49 Am. St. Rep. 794. See, also, the note to *Cottrill v. Krum*, 18 Am. St. Rep. 555.

AGENCY—LIABILITY OF PRINCIPAL FOR AGENT'S FRAUD. A principal is liable in a civil action for the fraud or deceit of his agent perpetrated in the course of his employment, although the principal did not authorize, justify, or know of his misconduct: *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652; 51 Am. St. Rep. 727.

STREET v. ALDEN.

[62 MINNESOTA, 160.]

JUDGMENTS—FRAUD IN OBTAINING—RELIEF.—If a defeated party has been prevented from fully exhibiting his case by fraud or deception practiced upon him by his adversary, as by keeping him away from court through a false promise of compromise, or where a defendant never had knowledge of a suit being kept in ignorance by the acts of the plaintiff, or in similar cases, a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair trial.

JUDGMENTS—FRAUD IN OBTAINING—RELIEF.—An action may be maintained to set aside the verdict of a jury given on an appeal from, and reversing on order of, a town board of supervisors vacating a highway, when such verdict was obtained by fraud. The action may be maintained by the owner of the land across which such highway ran, he having been one of the legal voters who petitioned for its vacation.

W. E. Todd, for the appellants.

Lovely & Edwards and H. A. Morgan, for the respondent.

¹⁶⁰ COLLINS, J. Plaintiff and other legal voters in due form petitioned the supervisors of defendant town to vacate and discontinue ¹⁶¹ a highway which ran diagonally through plaintiff's farm. On the hearing of the petition, two of the town supervisors voted in favor of granting the same, while the third supervisor, defendant Mathwig, opposed and voted against such action. The petition was granted, and an order duly made and filed with the town clerk vacating and discontinuing the highway. The regularity of the proceeding stands unquestioned. Within the time fixed by law (*Gen. Stats.* 1894, sec. 1857) defendant Svendsen, who lived upon and owned a quarter section of land cornering on plaintiff's farm, filed a notice of appeal from the order with a justice of the peace residing in another town, and caused a summons to be issued, which was served upon Mathwig only four days before the day set for the hearing or trial. No service was made on either of the supervisors who voted in favor of granting the petition, nor were they informed of such proceeding. On the day fixed for the hearing, Mathwig appeared for the town,

and waived the defective or insufficient service of the summons. He produced no witnesses and offered no evidence in behalf of the town, and on the testimony of appellant's witnesses the jury returned a verdict reversing the order appealed from, which verdict was afterward filed as required by law with the town clerk.

This action was brought to invoke the equitable powers of the court to set aside, vacate, and annul the verdict of the jury as rendered and returned in the justice's court, and as filed with the town clerk, upon the ground that the same was surreptitiously and fraudulently obtained through the alleged collusion and conspiracy of defendants Mathwig and Svendsen. The court below, upon findings of fact, ordered judgment as demanded, and also that the order of the supervisors be reinstated and declared of full force and effect.

1. We have no doubt that the plaintiff had such an interest in the subject matter of the supervisors' order as would enable him to maintain this action, and that the remedy sought is a proper one. The plaintiff, a signer of the petition, and the owner of the land upon which was the vacated and discontinued highway, was directly and materially affected by the verdict which reversed and set aside the supervisors' order. If the prayer of the petitioners had been refused, he could, as an aggrieved party, have appealed to a jury, and his rights did not end when, through fraud and deception, the order ¹⁶² granting the prayer was reversed and annulled. It is well settled, in proceedings strictly judicial, that where a defeated party has been prevented from fully exhibiting his case, by fraud or deception practiced upon him by his adversary, as by keeping him away from court through a false promise of a compromise, or where a defendant never had knowledge of a suit, being kept in ignorance by the acts of the plaintiff, these and similar cases, which show that there has never been a real contest on the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair trial or hearing: 1 Herman on Estoppel, sec. 397, and citations. See, also, *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332. And this rule is applicable to the proceedings now before us.

2. There was sufficient evidence to support the findings of the court below as to collusion and conspiracy through which the verdict on appeal was secured, although largely circumstantial. No one would expect direct and positive evidence of the alleged fraudulent practices. To be sure, there was a formal compliance with the statute as to the service of the summons, for a service upon one supervisor only is required, but the fact that it was

served upon the only member of the board who had strenuously opposed the vacation and discontinuance of the highway is suggestive, when we consider the other facts and circumstances. The appeal was brought before a justice in another town. Mathwig not only failed to notify a single one of the petitioners that an appeal had been taken, but he neglected to advise either of his associates on the board of supervisors. Without authority for so doing, he appeared and answered for the town on the day of hearing, and his next act was to waive an insufficient and defective service of the summons. He had no witnesses, and offered no evidence in support of the action of the board of which he was a member, permitting the case to go by default when good faith and official honesty required more than this of him. To conclude, it is quite evident from all of the circumstances that he was somewhat active in assisting Svendsen to secure a reversal of the order by which the highway had been vacated and discontinued.

Order affirmed.

JUDGMENTS—VACATING FOR FRAUD.—A judgment taken by default after a settlement between the parties contrary to plaintiff's promise to dismiss the action, relied upon by the defendants, may be vacated and set aside: *Cadwallader v. McClay*, 37 Neb. 359; 40 Am. St. Rep. 496, and note. When a party is prevented by fraud from interposing his defense before judgment is rendered, he may apply to that court for its annulment and to be let in to defend on the merits: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202, and note. Fraud will vitiate judgments and proceedings based on them: *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336. See, also, the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 104.

PETERSON v. RUSSELL.

[62 MINNESOTA, 220.]

NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENT—EVIDENCE TO FIX LIABILITY.—If one, not a party to a negotiable note, after it has been delivered to, and while it is in the hands of the payee, indorses it in blank, upon a valid consideration, parol evidence is admissible to fix his liability as maker, indorser, or guarantor, according to the intention of the parties.

NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENT—STATUTE OF FRAUDS.—If one, not a party to a negotiable note, after it has been delivered to, and while it is in the hands of, the payee, indorses it in blank upon a valuable consideration, for the purpose of assuming the liability of a guarantor, such act, authorizes the payee to write over the signature the contract of guaranty in full, and, that being done, it is a sufficient note or memorandum in writing to take the case out of the statute of frauds.

NEGOTIABLE INSTRUMENTS—EXTENSION OF TIME OF PAYMENT—CONSIDERATION.—Extension of time of pay-

ment of a note past due is a sufficient consideration for a promise to pay it.

NEGOTIABLE INSTRUMENTS.—IF PAYMENT OF A NOTE IS GUARANTEED, the mere neglect of the holder to pursue the maker does not discharge the guarantor.

Brown & Carr, for the appellants.

A. C. Wilkinson, for the respondent.

221 START, C. J. Action to charge the defendant as guarantor of the payment of a negotiable promissory note.

Upon the trial, the plaintiffs offered evidence, and then rested, tending to establish the following state of facts: That on May 4, 1892, Thomas Connors made and delivered to the plaintiffs his note whereby he promised to pay to them or order on November 1, 1892, one hundred and forty-five dollars. After the maturity of the note, and on March 31, 1893, the defendant agreed with the payees of the note, the plaintiffs, in consideration of their extending the time of its payment to December 15, 1893, to guarantee the payment of the note, and, in execution of his agreement, he signed his name on the back of the note in blank, and it was returned to the plaintiff's agent, and they, by such agent, signed a memorandum on the back of the note in these words: "In consideration of Mr. William Russell indorsing this note, payment of the same is hereby extended until Dec. 15, 1893." On January 29, 1894, the defendant refusing to pay the balance then due on the note, the plaintiffs, by their attorney, wrote over the defendant's signature the formal contract of guaranty, in these words: "March **222** 31, 1893. In consideration of the time of payment of the within note being extended until Dec. 15, 1893, I hereby guaranty payment of the within note"—and brought this action on such guaranty.

Whether the defendant's agreement was to guarantee the note or to indorse it, in the strict sense of the term, is an open question upon plaintiff's own evidence, but it was sufficient to warrant a finding by the jury that the contract was to guarantee the payment. The trial court dismissed the action, when the plaintiffs rested, exception by them, and from an order denying their motion for a new trial this appeal was taken.

1. What was the legal liability assumed by the defendant by signing his name in blank upon the back of this note, pursuant to his oral agreement to guarantee its payment? This is practically the only question in this case.

It is perfectly manifest that by this irregular indorsement he intended to become responsible to the payees for its payment, in some capacity, as maker, indorser, or guarantor. What liability

one who is not a party to a negotiable instrument otherwise than by his indorsement of it, and who is in no manner connected with the title to it or its transfer, assumes by signing his name in blank upon the back thereof, is a question upon which there is much confusion and weighty conflict in the adjudged cases. They cannot be harmonized, and we shall not attempt any analysis of them. In some states, notably in Massachusetts, the question has been put at rest by a statute to the effect that in all such cases, whether his name is placed upon the paper before its delivery to the payee or afterward, the party shall be charged only as an indorser. This is a certain, practical, and desirable rule; and, if it had been adopted by the courts when the question first arose, it would have saved litigation, and some lying. But we cannot now adopt the rule without disregarding well-settled principles and resorting to judicial legislation.

The position of the name of such a party upon the paper is in itself one of ambiguity. It is an irregular indorsement, and does not, without parol evidence as to when the indorsement was made and its purpose, indicate the relation of the indorser to the paper or the parties to it. He is not strictly an indorser, for the paper is not negotiated or title made through his indorsement; hence there ²²³ is a pretty general agreement of the authorities that parol evidence is admissible, as between the original parties, to show the relation of such party to the paper, and to fix his liability as maker, indorser, or guarantor, according to the intention of the parties: *Rey v. Simpson*, 1 Minn. 282 (380); 22 How. 341; *Kern v. Von Phul*, 7 Minn. 341 (426); 82 Am. Dec. 105; *Good v. Martin*, 95 U. S. 90; *Coulter v. Richmond*, 59 N. Y. 478; *Tiedeman on Commercial Paper*, sec. 270; 1 *Daniel on Negotiable Instruments*, secs. 710, 711. In case of regular indorsements—that is, where the paper is first indorsed by the payee—the law attaches a definite liability to the act, and parol evidence is not admissible to vary it; *Knoblauch v. Foglesong*, 38 Minn. 352; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742. This rule, however, does not apply to an irregular indorsement, except that this court has held that where it is once shown by parol evidence that the name of an apparent stranger to the paper was signed upon the back of it before its delivery to the payee, to induce its acceptance, he will be held as an original maker, and such evidence is not competent to show that he intended to charge himself as indorser only: *Peckham v. Gilman*, 7 Minn. 355 (446); *Robinson v. Bartlett*, 11 Minn. 302 (410). We have also held that where such an indorsement is made for a valuable consideration, after the delivery of the paper to the payee,

but while it is in his hands and before its maturity, and the payee subsequently indorses it to a bona fide holder, the party making the irregular indorsement will, in favor of such holder, be held as an indorser: *Buck v. Hutchins*, 45 Minn. 270. Except as limited in these cases, the general rule that parol evidence is admissible to ascertain the intention of the parties to an irregular indorsement is in force in this state; and such evidence is properly received in this case to show the actual relation the defendant agreed to and did assume with reference to the note in question.

This leaves only the question of the statute of frauds to be considered. The defendant's contract of guaranty was a collateral one to answer for the debt of another, and must, to enable the plaintiffs to enforce it, be evidenced by a note or memorandum in writing expressing the consideration. The signature of the defendant alone on the back of the note is not sufficient: *Moor v. Folsom*, 14 Minn. 260 (340); 100 Am. Dec. 227. Assuming the facts which the evidence tends to establish, ²²⁴ we have a case where the defendant, for a valid consideration, agreed to guarantee the payment of a note then past due, and still in the hands of the payees. His contract excludes the idea that he intended to be held only as an indorser, and, in execution of his contract, he writes his name upon the back of the note and leaves it with the payees, who overwrite his signature with the actual contract he has made, which satisfies in form the statute of frauds. The question, then, in its last analysis, is one of agency only. The actual contract is proved for the purpose of showing the authority to overwrite the signature. Were the payees authorized to thus overwrite the signature? The question is an open one in this state, for although the case of *Moor v. Folsom*, 14 Minn. 260 (340), 100 Am. Dec. 227, seems to indicate that an affirmative answer should be given to the question, the opinion expressly disclaims any purpose to so decide. It was a matter of indifference who wrote out the formal contract of guaranty after the minds of the parties had met, the contract had been made, and the defendant had signed his name on the back of the note. The writing was only the evidence of what the parties had done. The defendant's signature to it was the material thing. He could sign his name in blank, and authorize the payees or anyone else to write his contract over his signature. It was not necessary that the authority to do so should be in writing or expressly given, if clearly indicated by his acts.

In the light of the law and commercial usage, there can be but one reasonable inference to be drawn from the defendant's act in delivering his blank indorsement to the payees in execution of

his contract of guaranty. Such act was authority to them to write over his signature anything that was consistent with his undertaking to guarantee the paper.

We are of the opinion, upon principle and authority, and so decide, that where one not a party to a negotiable note, after it has been delivered to and while it is in the hands of the payee, indorses it in blank, upon a valid consideration, for the purpose of assuming the liability of a guarantor, such act authorizes the payee to write over the signature the contract of guaranty in full, and, that being done, it is a sufficient note or memorandum in writing to take the case out of the statute of frauds: *Beckwith v. Angell*, 6 Conn. 315; *Ulen v. Kittredge*, 7 Mass. 233; *Tenney v. Prince*, 4 Pick. 385; 16 Am. Dec. 347; 225 *Webster v. Cobb*, 17 Ill. 459; *Chaddock v. Vanness*, 35 N. J. L. 517; 10 Am. Rep. 256; *Harding v. Waters*, 6 Lea, 324; 1 Brandt on Suretyship and Guaranty, sec. 176, and notes; *Tiedeman on Commercial Paper*, sec. 270. Such was the rule in the state of New York at one time, and it is still the law of that state that, where the paper is not negotiable, the holder may overwrite the indorser's name with a contract of guaranty or that of a maker, according to the intention of the parties: *Richards v. Warring*, 1 Keyes, 576; *Cromwell v. Hewitt*, 40 N. Y. 491; 100 Am. Dec. 527.

2. It is urged by defendant that there was no valid consideration for his contract. The consideration was the extension of the time of payment of a past due note. This was a sufficient consideration to support the guaranty: *Nichols etc. Co. v. Dedrick*, 61 Minn. 513.

3. The defendant also claims that he was discharged by the delay of the plaintiffs in enforcing collection against the maker of the note: Citing *Crane v. Wheeler*, 48 Minn. 207. The case is not in point, for the guaranty in that case was the collection of the note; here the payment of the note was guaranteed, and mere neglect of the holder to pursue the maker does not discharge the guarantor: *Hungerford v. O'Brien*, 37 Minn. 306.

It follows that the plaintiffs made a prima facie case, and were entitled to have their case submitted to the jury.

Order reversed and a new trial granted in full.

NEGOTIABLE INSTRUMENT—INDORSEMENT—PAROL EVIDENCE TO FIX LIABILITY.—Parol evidence is not admissible to alter or vary the liability created by a contract of indorsement, and this is true whether the indorsement consists merely of the indorser's signature or whether the agreement imported by the signature is written over it in full: *Hately v. Pike*, 162 Ill. 241; 53 Am. St. Rep. 304, and note. See, also, the extended notes to *Hill v. Ely*, 9 Am. Dec. 381, and *Stack v. Beach*, 39 Am. Rep. 116.

FORBEARANCE TO SUE AS A CONSIDERATION TO SUPPORT A PROMISE.—No rule of law is better settled than that an agreement to forbear proceeding at law or in equity to enforce a well-founded claim is a sufficient consideration to support a promise: *Extended notes to Prater v. Miller*, 60 Am. Dec. 524; and *Staver v. Missimer*, 6 Am. St. Rep. 145.

A **GUARANTOR** is discharged by an extension of time for the payment of the debt whose payment he guarantees, unless he subsequently ratifies the extension: *Bishop v. Eaton*, 161 Mass. 496; 42 Am. St. Rep. 437. A mere delay to pursue the principal and collect the money of him does not discharge a guarantor, provided such delay is unaccompanied by fraud or an agreement not to prosecute the principal: *Read v. Cutts*, 7 Greenl. 186; 22 Am. Dec. 184; but a guarantor of collection will be discharged by delay of six months in taking measures to collect the debt where all the principals reside in the state and can be personally served: *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469.

LARSON v. NICHOLS.

[62 MINNESOTA, 256.]

REPLEVIN—CROSS-ACTIONS.—One whose property has been taken on replevin against his agent, cannot retake it by replevin from the plaintiff in the first action during its pendency.

A. A. Miller, for the appellants.

J. Walseth, for the respondent.

256 MITCHELL, J. The substance of the findings of the court (in accordance with the allegations of the answer) is, that there was pending and undecided a prior action of replevin to recover possession of the same property, brought by the defendant in this action against one Knutson, the agent of the plaintiffs, who was in possession of the property and holding it and claiming the right to its possession solely as such, "by virtue of the same claim and right of ownership and possession as is claimed by the plaintiffs in this action"; that the issue in both actions is the same, viz., whether the plaintiff in the first action or the plaintiffs in this action are entitled to its possession; that by virtue of the writ of replevin in the first action the property was taken from the possession of Knutson. The first action was in justice's court, and presumably the possession of the property was delivered under the writ to the plaintiff in that action.

It may be assumed (without deciding), in accordance with what seems to be the general current of the authorities, that after property has been delivered to the plaintiff in an action of replevin, it may be taken from him in another action of replevin by a third **257** person who is a stranger to the parties in the first

suit, notwithstanding that such first suit is still pending. But nothing is better settled than that neither the defendant nor those in privity with him can maintain a cross-replevin against the plaintiff in the first suit during its pendency. The reasons are obvious. Any such course would lead to confusion and multiplicity of suits, and is wholly unnecessary, as the rights of both parties can be fully determined in the first suit. It seems to us these reasons apply with full force here. The issue in both cases was identical, viz., the right of Larsen, Carpenter & Co., as mortgagees, to the possession of this property. Knutson, the defendant in the first action, claimed nothing in his own right. He claimed the possession merely as agent or bailee of Larsen, Carpenter & Co., and that claim had to be maintained, if at all, by establishing the right of his principals.

The plaintiffs rely on the familiar rule that, to constitute a good plea of a former action pending, there must be an identity of parties in both actions. But the rule against cross-replevins does not rest entirely upon the same grounds as those which obtain in the ordinary case of the pendency of two suits for the same cause of action. The fact that a party is enabled to bring replevin against an agent instead of the principal, because the agent happens to have the actual possession of the property, ought not to be allowed to take the case out of the rule against allowing cross-replevins. To do so would be a mere evasion of the rule. The fact that the parties in the two suits are nominally different—the agent being a party to the one and his principals party to the other—is not important, as both claim under the same right: *Fisher v. Busch*, 64 Mich. 180; *Beers v. Wuerpul*, 24 Ark. 272. See, also, *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151. We have not overlooked *White v. Dolliver*, 113 Mass. 400; 18 Am. Rep. 502, contra. The confusion and injustice that would result from allowing this action to proceed, pending the other, can be illustrated by these very cases. In the first action (*Nichols v. Knutson*, 62 Minn. 237), we have just directed judgment to be entered in favor of Knutson for the return of the property. If the present (the second) action was maintainable, then, on precisely the same grounds, plaintiffs would be entitled to a similar judgment against Nichols. In other words, there would be two judgments for the property against Nichols, ²⁵⁸ both in favor of, in effect, the same party, and based on the same right. Under our statute, there is no doubt of the right of Larsen, Carpenter & Co. to intervene in the suit against their agent or bailee, Knutson. There is no hardship in holding that, if they elected not to do so, they should

have waited until the determination of that action before commencing suit.

The judgment in this case should have been one of dismissal, and not on the merits. In view of the findings of fact and conclusions of law, it is not entirely clear which this is. But plaintiffs do not make the point or ask for any modification. The judgment is, therefore, affirmed, but with leave to the plaintiffs, if so advised, to move the court below to modify its conclusions of law and judgment.

So ordered.

REPLEVIN—CROSS-ACTIONS.—Where goods have been taken by a sheriff into his possession by virtue of a writ of replevin, they cannot be taken from him by another writ of replevin: *Sanborn v. Leavitt*, 43 N. H. 473. In *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502, however, it was held that one whose property had been replevied by a writ against his agent or his bailee can retake it by replevin from the plaintiff in the first action even during the pendency of that action.

FARRELL v. ST. PAUL.

[62 MINNESOTA, 271.]

JUDGMENTS IN REM—ESTOPPEL.—A judgment against property in favor of a city in special assessment proceedings to pay for street improvements already made in front of such property, to which the owner thereof is not a party and against which he did not appear nor defend, does not estop him from maintaining suit against the city for injury to his property by wrongfully lowering the established grade and removing lateral support. Such proceedings and judgment are in rem, and estop the owner only so far as they affect his right to, or ownership of, the property subsequent to seizure under such proceedings.

S. L. & W. L. Pierce, for the appellant.

E. J. Darragh and R. Howard, for the respondent.

²⁷² CANTY, J. Plaintiff is, and since 1891 has been, the owner of a certain city lot situated in St. Paul, and having a frontage of forty feet on Wells street. In 1892 the city excavated and graded down the half of said street adjoining said lot, five feet below the legal ²⁷³ and established grade, and erected a retaining wall in the middle of the street, leaving the other half of the street at the established grade, thereby giving the street a dual grade. In doing the grading, the city removed the lateral support of plaintiff's lot where it abuts on the street. This action is brought to recover the damages to the lot caused by so removing the lateral support, and also the damages caused by

grading down the street below the natural surface of the lot and the established grade of the street, thereby depriving the lot of means of access to the street.

On the trial, it was stipulated that the judge should determine all questions in the case except the amount of damages, which should be determined by the jury. The jury, by their special verdict, found that plaintiff was damaged by reason of the removal of the lateral support of the lot in the sum of fifty dollars, and by reason of the grading down of the street below the established grade in the sum of two hundred and twenty-five dollars. Thereupon, the judge filed his findings of fact and conclusions of law, in which he found for defendant, on the ground that a certain tax judgment entered against this lot, for the tax levied against it on a special assessment to pay for the grading in question, is a conclusive adjudication, so far as the lot and the plaintiff are concerned, that the grading was legally done, and that said judgment is a bar to this action, and estops the plaintiff from asserting that the grading in question was wrongful. From the judgment entered thereon in favor of defendant, plaintiff appeals.

The tax judgment in question was entered in a proceeding in rem against the lot, commenced on published notice. Plaintiff was not personally served with notice—no such service is required by the statute—and he did not appear in the proceeding, or defend against the application for judgment. It is, perhaps, true, as stated by the learned judge of the court below, that if the work was illegal, the city was not entitled to judgment, and if that defense had been made in that proceeding it would have prevailed. But the only consequence flowing from the failure to make such defense is, that it has been conclusively adjudicated that the lot in question owes the city of St. Paul one hundred and forty-two dollars for doing this grading and certain costs, and that the lot is condemned to pay the same. This judgment is against the plaintiff only so far as it affects his right to, or ownership of, the lot since the seizure of the same in the tax proceedings, and ²⁷⁴ does not estop him from asserting that, prior to such seizure, he was the owner of the lot, in full possession thereof, and entitled to all the rights and emoluments of such ownership. The court does not find any facts from which it appears that the lot was seized in the proceedings in rem before the trespass in question was committed. What the effect would be if it had so found, we will not now determine, as the point has not been argued. The burden was on the defendant to establish

every fact necessary to sustain its defense of former adjudication, and, as far as appears by the record, it has failed to do so.

Just how far a judgment in rem estops, in a collateral proceeding, the parties immediately interested and their privies, and how far it estops the whole world, are questions hard to determine from the books. Respondent has cited a number of cases in which it has been held that a judgment in rem in a court of admiralty, condemning the vessel for reasons appearing in the record, is conclusive against the owner, in a suit by him on the policy of insurance for the loss, that such reasons in fact existed, and if the facts thus established constitute a breach of the warranty of the owner to the insurer, the owner cannot recover. As applied to this class of cases, this is a well-established rule of law: *Croudson v. Leonard*, 4 Cranch, 434, and cases cited; *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 600; *Street v. Augusta Ins. Co.*, 12 Rich. 13; 75 Am. Dec. 714; *Baxter v. New England Ins. Co.*, 6 Mass. 277; 4 Am. Dec. 125. But, as establishing a general principle of law, applicable to all classes of cases, this rule cannot be upheld. As the whole world are parties to a proceeding in rem, it would amount to saying that, as to the facts necessarily passed upon and adjudged to exist by the judgment in rem, there arises an estoppel by verdict against everyone in every collateral proceeding, and that everyone in the world is conclusively estopped from disputing the existence of such facts. This would amount to saying that a judgment in rem has the same effect, in all collateral matters, all over the world, that an edict of the czar has in the Russian dominions—a result that would be most appalling.

But it is said that the cases which we have cited only go to the extent of holding that a judgment in rem has this effect as against a party directly interested, and in favor of a party collaterally interested. ²⁷⁵ Let us analyze this proposition. Supposing that, in such a case as those already cited, A is interested directly in a proceeding in rem, and is also interested in a collateral matter involving the same facts, in which collateral matter B is also interested. Now, it is well settled that, in subsequent litigation between A and B, B is not bound by the judgment in the proceeding in rem, because he had no direct interest which entitled him to appear and defend in that proceeding. Therefore, the judgment in that proceeding cannot estop him. Then, how can it be held that, as between A and B, it estops A? Such estoppels must be mutual. Then, if the estoppel by verdict is not equally binding on everyone in the world in all collateral matters, so as to make it mutual, these cases are unsound in principle. The only ground on which they can be sustained is, that public

policy has attached to the warranty of legality made by the insured to the insurer a further implied warranty that the insurer will defend, so that in fact his undertaking is both to warrant and defend; and this seems to be the opinion of the supreme court of Massachusetts, as expressed in *Brigham v. Fayerweather*, 140 Mass. 411, in which that court declined to apply the rule laid down in these cases as a general principle of law.

It is true that, in the case at bar, both parties were directly interested in the proceeding in rem, and also in the collateral matter on which this action is brought. But why should this change the rule? A proceeding in rem assumes the whole world to be interested. It knows no particular party, unless he has appeared, when it may become, as to him, a proceeding also in personam. A judgment in rem does not concern itself about any particular party in interest who has not appeared. It treats the whole world alike, and is binding on the whole world alike. It seems to be more binding on the party directly interested, simply because his direct interest is bound. He may be more interested in the result, and have more to lose or gain by the judgment, than the rest of the world; but how does this add to the conclusiveness of the judgment, as against him, more than as against the rest of the world, who are as much parties to the proceeding as he is? The thing in which he is interested is in court, but he himself is no more in court than are all the rest of the world. Unless he appears and becomes a party to the proceeding, he ²⁷⁶ is not a party in any such sense as a party in personam. But how can the estoppel as to the collateral matter or thing operate unless it operates through the person? The collateral matter or thing was not seized, and was not in court in the proceeding in rem. How, then, can it be affected by that proceeding? To hold so would be to hold that a proceeding in rem is, as to collateral matters, a proceeding in personam; aye, more than a proceeding in personam.

If the tax judgment here in question was entered by default, in an action strictly in personam, in which the city of St. Paul was plaintiff, and the plaintiff here was defendant, it would not estop him from asserting, in this action, that the improvement in question was tortious, and injured his lot. This is not the same cause of action as that in the tax proceeding, and the wrongful acts here set up were not set up or litigated as a defense in that action. Under these circumstances, this plaintiff is not estopped: See *Adams v. Adams*, 25 Minn. 72; *State v. Cooley*, 58 Minn. 514; *Cromwell v. County of Sac*, 94 U. S. 351. The class of cases to which those first above cited belong are the only ones

that we can find which sustain respondent's position. It is true that many of those cases lay down the doctrine generally that a judgment in rem is binding on the whole world in collateral matters, but the authorities cited in these cases do not bear this out. In fact, most of the authorities so cited are not cases of judgments in rem at all, but of judgments in personam, which for certain purposes are held conclusive upon the whole world. As to such cases, there is a distinction between doing an act and declaring that it has been done. There is a distinction between adjudging what now is and shall hereafter be, and adjudging what has heretofore been. In an action in rem, and also in an action in personam, when all the parties in interest are before the court, the act which the judgment in itself performs—the legal consequences of the judgment—is binding on the whole world, if for no other reason, for the simple reason that the act is, in fact, performed. Thus, if the court had jurisdiction, a judgment of divorce is conclusive on the whole world that the parties have ceased to be husband and wife, for the simple reason that, if the stranger to the judgment is not able to dispute the existence of a valid judgment, there is nothing left for him to dispute. But, supposing that the judgment also adjudges the prior ²⁷⁷ existence or nonexistence of certain facts, there is no estoppel by verdict as to these facts, except as between the parties in personam and their privies. Thus, a valid judgment declaring a marriage absolutely void, and annulling it, is conclusive on the whole world that the parties have not since been husband and wife; but it is only conclusive on the parties and their privies that they never were husband and wife. As to the rest of the world, it has no other effect than that of a judgment of divorce. The following cases illustrate the doctrine that the act performed by the judgment itself is conclusive for and against the whole world: *Frost v. St. Paul etc. Co.*, 57 Minn. 325; *Hood v. Hood*, 110 Mass. 463. See, also, 1 Greenleaf on Evidence, sec. 538. The following cases illustrate the doctrine that the mere adjudication by the judgment of the existence or nonexistence of prior facts is conclusive only as between parties and privies: *Gill v. Read*, 5 R. I. 343; 73 Am. Dec. 73; *Butterfield v. Smith*, 101 U. S. 570; *Williams v. Williams*, 63 Wis. 58; 53 Am. Rep. 253.

But there is another reason why the tax judgment does not, in this action, estop this plaintiff. In a proceeding in rem there is a wide distinction between things guilty or hostile, and things indebted. The libellant in the one case claims the *jus in rem*; in the other, the *jus ad rem*. "Decrees against things guilty and

things hostile merely declare the status of such things. They do not forfeit anything, but simply declare or pronounce the forfeiture previously incurred; on the other hand, decrees against things indebted, are similar to a judgment for debt against a personal debtor": Waples on Proceedings in Rem, sec. 3, subd. 10. "The object of the action against debtor property is to make the money that is owing by it. When that object is accomplished, any surplus of proceeds inures to the owner of the res proceeded against. He may stop the proceedings at any stage by paying the debt, while the owner of a thing guilty or hostile has not this privilege": Waples on Proceedings in Rem, sec. 455. In a proceeding in rem against a thing guilty or hostile, it is held that the judgment relates back to the time of forfeiture, and divests the title to the thing seized (not to collateral things) from that time. But, in a proceeding in rem, or quasi in rem, against a thing indebted, how can the judgment relate back beyond the time of seizure or attachment? The prior ownership of such property is divested, ²⁷⁸ not merely by the judgment, but by the subsequent sale. In such a case, is anything sold that is not seized? It would seem not. Again, the question in such a case is usually, not the extent or character of the thing seized, but the existence, extent, and character of the indebtedness against it. But it is well settled that the determination of the existence, character, and amount of such indebtedness is *res adjudicata* only so far as it is satisfied by the condemnation and sale of the res: *Bishop v. Travis*, 51 Minn. 183; *Thurston v. Thurston*, 58 Minn. 279. The tax judgment here in question was obtained against a thing indebted, and the adjudication of the existence, character, and amount of that debt in that proceeding is an estoppel against all now claiming the thing seized, in so far as the indebtedness so adjudged was satisfied by the condemnation and sale of the thing seized; but we can give that adjudication no other or greater effect. We cannot hold that, in an action in which the title obtained to the thing seized and condemned is not involved, this adjudication now estops this plaintiff from disputing the existence, character, or amount of the indebtedness so adjudged in that proceeding to exist.

The judgment appealed from is reversed, and, on the verdict and findings of fact, judgment is ordered for plaintiff pursuant to this opinion.

A JUDGMENT DOES NOT BIND ONE NOT A PARTY THERE-TO: *Short v. Galway*, 83 Ky. 501; 4 Am. St. Rep. 168, and note; *Le Roy v. Rogers*, 30 Cal. 229; 89 Am. Dec. 88, and note; extended note to *Hill v. Bain*, 2 Am. St. Rep. 876-878.

MORGAN v. KENNEDY.

[62 MINNESOTA, 348.]

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR SLANDER BY WIFE.—At common law, a husband is liable in damages for slanderous words uttered by his wife though he is not present, and does not participate in any manner. This rule has not been abrogated by statute in Minnesota.

SLANDER.—WORDS INVOLVING MORAL TURPITUDE on the part of plaintiff, as well as charging him with an indictable offense, are slanderous per se.

SLANDER.—WORDS INVOLVING MORAL TURPITUDE on the part of plaintiff, as well as charging him with an indictable offense are slanderous per se.

J. L. Townley and T. M. Holland, for the appellant.

F. P. Hopkins, for the respondent.

350 COLLINS, J. The paramount question presented by this appeal is, whether a husband is liable for slanderous words uttered by his wife when he is not present, and in which he has not participated in any manner—in other words, has the common-law rule which makes the husband answerable in damages for the torts of his wife during coverture been abrogated by statute? Counsel for appellant does not claim that this rule has been wiped out by direct enactment, but earnestly insists that this is the inevitable result of legislation respecting married women and their property, their and its legal status. To determine this question, we are required to examine statutory enactments from the days of territorial legislation, keeping in mind the well-settled rules of construction that the common law will be held no further abrogated than the clear import of the language used in the statutes requires, and that an intention to change the common law will not be presumed from doubtful statutory provisions.

From the examination we find that the earliest of our statutes relating to married women in their property, and in any way changing the common-law rules which theretofore prevailed, is found in the Revised Statutes of 1851, chapter 71, section 105—territorial legislation. This section appears in a chapter entitled "Issues, and the Mode of Trial," and as a part of the provisions respecting the issuance, levy, and satisfaction of executions in civil proceedings, and it seems to be a rearrangement and enlargement of the terms of chapter 375 of the Laws of New York of 1849. We are unable to say more than this of its origin. It provided that all real or personal estate acquired by a female before her marriage, or to which she became entitled after marriage by in-

heritance, gift, grant, or devise, should be and continue hers after marriage, not liable for her husband's debts or liabilities, but liable for all of her debts contracted before marriage. We need not specially refer to the provisos, as they do not bear upon the question in hand. In Public Statutes of 1858, this section, with a proviso added in 1858 (of no consequence here), appeared as section 106, chapter 61, which chapter was also entitled ³⁵¹ "Issues, and the Mode of Trial." It is further to be noticed that it still retained its position among the provisions regulating the issuance, levy, and satisfaction of executions upon judgments in civil proceedings. While this statute was in force, it was assumed by this court that the common-law rule of a husband's liability still prevailed: *Brazil v. Moran* (1863), 8 Minn. 205 (236); 83 Am. Dec. 772.

By General Statutes of 1866, chapter 122, all of the legislation we have referred to was expressly repealed; and, in place thereof, there was enacted chapter 69, entitled "Married Women," which radically changed the status of married women, and greatly enlarged their rights, powers, duties, and liabilities. This was the first law upon the subject after statehood. The first section provided when and how married women might hold property in their own right, not to be disposed of without the consent of their husbands; the record of a schedule of the property owned by them when married being necessary to protect it as against their husbands' creditors. The next three sections are not pertinent to this discussion, but, by the fifth, provision was made for the transaction of any business or trade by a wife in her own name and for her own benefit when abandoned by her husband, or in case he neglected to properly care for his family. All contracts made by the wife in the usual course of the business or trade were declared to be as valid and binding upon her as if she were sole, and she was to be free from all interference by her husband and his creditors in relation to the business or trade. To this section was appended a proviso "that the husband shall not be liable for any contract, default, or tort, of the wife made, done, or incurred in the course of transacting such business or trade." Among the provisions of this chapter is one to the effect that a married woman may be sued upon any contract made or wrong committed before her marriage, the same as if she were single.

In the order of legislation, we now come to Laws of 1869, chapter 56, now incorporated into General Statutes of 1894 as section 5531 et seq., and this enactment entirely superseded the law of 1866, *supra*. By this statute, further innovations were intro-

duced, and again were the rights, powers, and liabilities of a married woman extended and enlarged, and she was expressly charged with personal liability for her torts; and it was enacted that the husband should not be held for her debts or contracts. Then, as if to emphasize the matter, and place the legislative intention beyond all doubt, it was provided (section 5536) that ³⁵² nothing in the act should be construed as exempting a husband from liability for torts committed by the wife.

Counsel for appellant have not called our attention to any other legislation which, in their opinion, is pertinent, except Laws of 1887, chapter 207 (Gen. Stats. 1894, sec. 5530), and of that we shall hereafter speak; nor have we been able to discover any, and we are justified in asserting that there is none. The argument of counsel is mainly rested upon an application of the maxim, "*Cessante ratione legis, cessat ipsa lex*," to the territorial legislation found in the Revised Statutes of 1851, chapter 71, with the amendments in Public Statutes of 1858, chapter 61. Commenting upon the subsequent enactment (Gen. Stats. 1866, c. 69), and especially that part of it which absolves the husband from liability for a tort committed by the wife in the course of transacting a business or trade for herself, they argue that it cannot be allowed to have the effect of preventing the prior legislation or the remaining sections of chapter 69 from having its and their legitimate and natural result; namely, of relieving the husband from the burden imposed at common law. And, referring to the act of 1869 (now found in Gen. Stats. 1894), they insist that, if the earlier statutes had the force and effect claimed for them—had actually changed the rule—the fact that the legislature which incorporated section 5536 into the law did not comprehend the situation and appreciate what had theretofore been accomplished is of no consequence, and that nothing less than a positive reenactment of the common-law rule upon the subject could overcome the effect of the prior statutes.

It is evident from the provision found in General Statutes of 1866, chapter 69, exempting the husband from liability for all torts committed by the wife in the course of her separate business transactions, that it was then understood by the legislators that the common-law rule was still in force. If this had not been the understanding, and if it had not been the legislative intent to continue the liability as to other torts, this particular feature of the law would not have appeared. It is certain that there would have been no exemption from certain torts if it had been supposed that, under the earlier statutes, the husband had been ab-

solved from all, and such legislation would have served no purpose whatsoever. The same thing can be said of the act of 1869, and with greater force, for in that act the legislature expressly provided in one section that the husband should no longer be liable for the wife's debts or contracts, not mentioning torts at all, and in another it specifically ³⁵³ declared that the prior sections of the statute should not be construed as exempting husbands from the common-law liability. Again do we find emphatic expression of the legislative understanding and its purpose and intent. We do not speak of the legislative understanding of the scope of some prior statutes because it can be allowed to control such statutes, but simply in connection with the intent and purpose of the legislatures enacting the laws of 1866 and 1869. The intent of both of these statutes is exceedingly clear; and that, believing the common-law rule still in existence, it was the fixed purpose of the lawmakers to retain it, is obvious.

We are now brought to a consideration of the statute of 1851, which, in so far as it affects the present question, stood unchanged until 1866. It is to be observed that the Revised Statutes of 1851, chapter 71, section 105, was not passed as a "Married Woman's Act," as were its successors, and that it simply appeared among statutory provisions regulating procedure upon executions in civil actions. Its design was to protect the property of the married woman from seizure to satisfy a husband's debts. It did not purport to confer upon the wife any new duties, nor did it grant any rights not theretofore belonging to her, except as it declared in a few words that the real and personal estate acquired before marriage by her personal industry, or before or after marriage by inheritance, gift, grant, or devise, should remain her own after marriage, and that none of it should be subjected to seizure to satisfy her husband's debts, engagements, or liabilities. She was prohibited from disposing of such property during coverture without the consent of her husband, except as might be ordered by the district court. The object in view, and what was designed by the legislature, was to protect the wife's property from her husband's creditors. She was not empowered by this statute to enter into contracts as if she were unmarried. It gave her the right to hold property, not as a feme sole, but as if it had been settled to her own separate use as a feme covert. The disabilities imposed upon the wife at common law were not removed except in one respect. There was no general removal, as has been the express purpose and result of more recent legislation throughout this country. The right of the wife to retain the ownership of

such real and personal estate as was hers at marriage, and such as might come to her during coverture by inheritance, gift, grant, or devise, was distinctly declared; but there was nothing whatever to indicate ³⁵⁴ that the husband should no longer be held liable for his wife's torts. While the statute emancipated the woman in respect to her property, it did not emancipate the man from the duties and obligations assumed by him upon marriage.

In the statutes of 1851, regulating pleadings or relating to parties, nothing can be found which suggests or requires any change where an action is brought based upon a tort committed by the wife. Attention has been specially called to the fact that upon statutes changing the rights, duties, powers, and obligations of married women, wholly silent as to a removal of the husband's liabilities, it has been held that they must be construed as absolving the latter from liability for the torts of their wives: *Martin v. Robson*, 6 Ill. 129; 16 Am. Rep. 578; *Norris v. Corkill*, 32 Kan. 409; 49 Am. Rep. 489. The conclusion reached in these cases is based upon the maxim, before mentioned, "The reason of the law ceasing, the law itself ceases." But an examination of the statutes referred to in these cases will show that they are much broader than the one we are now considering. Again, the current of authority is opposed to the views expressed in these decisions, even in jurisdictions where statutes have been very sweeping, and have completely emancipated the wife and her property from the control or interference of her husband. Without elaborating, we cite some of the cases: *Kowing v. Manley*, 57 Barb. 479; *Fitzgerald v. Quann*, 33 Hun, 652; affirmed, 109 N. Y. 441; *Quick v. Miller*, 103 Pa. St. 67; *Choen v. Porter*, 66 Ind. 194; *Ferguson v. Brooks*, 67 Me. 251; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Zeliff v. Jennings*, 61 Tex. 458. See, also, *Seroka v. Kattenberg*, 55 L. J. Q. B. 375. We are convinced that so radical a change of the common law cannot be upheld from the mere fact of the enactment of 1851, and that the language found in the married woman's acts of 1866 and 1869 plainly and conclusively refutes the proposition that by either the prevailing rule as to the husband's liability was abrogated.

There is nothing whatever in the claim of counsel that section 6, chapter 56, of the Laws of 1869 (Gen. Stats. 1894, sec. 5536), is unconstitutional, because it was legislation upon a subject not expressed in the title of the act itself. But, if this fact really possessed merit, it would be of no benefit to appellant, the reason clearly appearing in what has already been said.

We have heretofore adverted to the General Statutes of

1894, section 5530—the law of ³⁵⁵ 1887. Counsel urge that by reason of the language, “Women shall retain the same legal existence and legal personality after marriage as before,” the married female must alone be held responsible for her torts. We should feel gratified and relieved if the purpose and mission of this piece of legislation could be discovered, but it has no bearing upon the question now before us. We are willing to admit that its author, and possibly the legislature, intended to confer upon married women some great blessing in the way of additional rights, but it does not follow that man was to be relieved of burdens previously fastened upon him. We suspect that, speaking in a general way, an exactly opposite intention was in the mind of, at least, the author. Certain it is that, by the legislation of 1887, the husband was not absolved from his common-law obligation, and to construe the act as urged by counsel would prove a startling innovation. It would undoubtedly be opposed to the spirit of what was said in *Althen v. Tarbox*, 48 Minn. 18, 31 Am. St. Rep. 616, and *Kroessin v. Keller*, 60 Minn. 372, 51 Am. St. Rep. 533. Finally, on this point, we have to say that perhaps counsel are right when asserting that the common-law rule should be wiped out of existence, and that, in the present condition of things, it ought not to be tolerated for a moment. The remedy is within easy reach, however, and the appeal must be to the legislature, not to the courts.

It is further contended in appellant's behalf that the words set out in the complaint as those spoken by Mrs. Kennedy are not actionable per se. They were as follows: “He has been drunk throughout Thanksgiving week. He has not retired any night during that week other than in a state of drunkenness. He has drunken people in his room. He gets people in his room and makes them drunk. He was drunk during the early hours of the morning after Thanksgiving.” Drunkenness is a crime under the laws of this state: Gen. Stats. 1894, sec. 6949. It is punishable by indictment. It was held in *St. Martin v. Desnoyer*, 1 Minn. 131 (156), 61 Am. Dec. 494, and again in *West v. Hanrahan*, 28 Minn. 385, that words spoken of another which, when taken in their plainest and most natural sense, and as they would be ordinarily understood, obviously import the commission of a crime punishable by indictment are actionable per se. It is barely possible that, in view of the many indictable offenses in this state under the present statutes, some of which reflect very slightly, if at all, upon the moral character of a person indicted, the proposition so flatly laid ³⁵⁶ down in these two cases will have to be

qualified; but here the misbehavior charged in the words alleged to have been used by the defendant's wife was not only indictable, but involved the element of moral turpitude, and was such as to injuriously affect the social standing of the plaintiff. In view of the moral sentiment of the people of this state, on the subject of drunkenness, so pronounced as to lead to the enactment of the Scheffer law in 1889, we do not hesitate to say that moral turpitude is involved in the charge that a man has been getting other people drunk, and has himself been on a drunken debauch lasting for a week. The words uttered, according to the complaint, were actionable per se.

Order affirmed.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORTS OF WIFE.—A husband is liable for the torts of the wife committed by her alone and not in his presence: *Flesh v. Lindsay*, 115 Mo. 1; 37 Am. St. Rep. 374, and note with the cases collected. See, also, the extended note to *Commonwealth v. Neal*, 6 Am. Dec. 106.

SLANDER.—WORDS CHARGING A CRIME INVOLVING MORAL TURPITUDE and subjecting the offender to corporal punishment are actionable per se: *Posnett v. Marble*, 62 Vt. 481; 22 Am. St. Rep. 126. See, also, the extended note to *McFadin v. David*, 41 Am. Rep. 590-592.

GERMANIA BANK v. MICHAUD.

[62 MINNESOTA, 459.]

EXECUTORS AND ADMINISTRATORS—LIABILITY ON NOTES MADE BY.—An executor or administrator cannot bind the estate which he represents by any promissory note he may make. Such note can only bind him personally.

EXECUTORS AND ADMINISTRATORS.—NEGOTIABLE PROMISSORY NOTES made by executors or administrators as such, import sufficient consideration to bind them personally.

EXECUTORS AND ADMINISTRATORS—NOTES BY—CONSIDERATION.—A note made by an executor or administrator imports a sufficient consideration to bind him personally when he has assets in his hands which he might have applied in satisfaction of his obligation, or where a consideration for his promise has been received by him.

EXECUTORS AND ADMINISTRATORS—NOTES OF—CONSIDERATION.—A note given by an executor or administrator for the debt of his testator, without any new consideration, and after the time to file claims has expired, and when it has never been allowed or ordered paid by the court, is without consideration.

EXECUTORS AND ADMINISTRATORS—NOTES OF—CONSIDERATION—EXTENSION OF TIME OF PAYMENT.—Although generally an agreement to extend the time of payment of the debt of a third person is a sufficient consideration for a promise to pay that debt, yet such consideration is not sufficiently adequate to bind an administrator, who has signed a note in his official capacity, to pay a debt due by his testator.

J. L. Macdonald and H. J. Horn, for the appellants.

O. E. Holman, for the respondent.

⁴⁶³ CANTY, J. The plaintiff, as payee, brings this action against the defendants, as makers of the following note:

“\$36,000.00.

St. Paul, Minn., May 6th, 1892.

“Sixty days, without grace, after date the estate of E. Langevin or either of us promise to pay to the order of Germania Bank of St. Paul thirty-six thousand dollars, with interest thereon, at the rate of 8 per cent per annum from date until paid, for value received. Payable at the Germania Bank of St. Paul.

“THE ESTATE OF E. LANGEVIN,

“By Achille Michaud, Administrator.”

It is alleged that the defendants Eleanora Langevin, Emma Flanagan, and Mary E. Michaud indorsed said note before it was delivered to plaintiff, for the purpose of giving the same credit with plaintiff, and intending thereby to make themselves liable thereon as makers thereof. It is further alleged: “That the said defendant Achille Michaud had no authority whatever and was at no time empowered to make or deliver the said promissory note for or on behalf of the said estate of the said E. Langevin, deceased.” Judgment is demanded against all of the defendants personally for the amount of the note.

The defendant Achille Michaud answers, separately, and alleges: That on September 16, 1890, Edward Langevin died testate, and, at and before the time of his death, was indebted to plaintiff in the sum of fifty thousand dollars, and “was mentally and physically incompetent to transact business, and under the guardianship of certain persons, duly appointed as such by the probate court of said county of Ramsey, who were then duly qualified and acting as such; and that said plaintiff at that time held several unpaid promissory notes given to it by said guardians, solely for said indebtedness of said Edward Langevin, and which had been previously made, executed, and delivered by said guardians, as such, to said plaintiff; and that said unpaid promissory notes of said guardians, so held by said plaintiff at the time of the death of said Edward Langevin, were for sums amounting in the aggregate ⁴⁶⁴ to fifty or fifty-one thousand dollars.” That on March 14, 1891, the will of said deceased was duly probated and adjudged by the probate court of Ramsey county to be the last will of said deceased. That on July 21, 1891, he (Achille Michaud) was appointed administrator of the estate of said deceased with the will annexed, and letters of such administration were

then duly granted to him by the probate court of Ramsey county. That on the same day the probate court made its order limiting the time for creditors to file their claims against said estate to January 21, 1892. That said order was duly published, and the time for so presenting such claims expired on said January 21, 1892. That, prior to his appointment as such administrator, the estate had been in charge of three special administrators, who paid a portion of said indebtedness, thereby reducing such indebtedness to the sum of thirty-six thousand dollars; but that the claim was never presented to the probate court, or approved or allowed by that court, and that said balance of said claim so remaining unpaid was barred as a claim against said estate when the time so to present the same to said probate court so expired as aforesaid. "That on the sixth day of May, 1892, the said plaintiff still held the said notes of said guardians, or a note given solely in renewal of the same, for said thirty-six thousand dollars." That, on said last-named day, this plaintiff represented to him, said Achille Michaud, "that said plaintiff was not allowed to hold or carry what appeared to be overdue notes or commercial paper in its bank, and then and there, and for that alleged reason only, requested this defendant, as said administrator and not otherwise, to make and give to said plaintiff, in lieu and place of said overdue and unpaid notes for (and representing) said thirty-six thousand dollars, and not otherwise, the note of the said estate of said Edward Langevin for said thirty-six thousand dollars; and that thereupon said cashier made out all of said note set out in said complaint, except the signature of this defendant, using one of plaintiff's blanks with the words 'or either of us' printed therein, but not then noticed by this defendant or assented to by him; and this defendant then believing that said thirty-six thousand dollars was a legal and valid claim and demand against said estate, and not otherwise, as said administrator of said estate, and not otherwise, and without any consideration whatever therefor or moving to him, and solely at the request of, and for the accommodation of, the said plaintiff, and for ⁴⁶⁵ the purpose of plaintiff aforesaid, affixed his name to said note set out in said complaint, and solely as the note of said estate, as requested by said plaintiff, as aforesaid, and not otherwise." That there was no other consideration for said note except said indebtedness of thirty-six thousand dollars, which had been so barred by the statute of limitations; and that, at the time he signed said note, he was not aware of the fact that plaintiff had failed to file a claim for such indebtedness in the probate court, or that it was

so barred, but believed that such indebtedness was a valid claim against said estate. This is all of the answer that it is necessary here to consider.

The other defendants interposed a somewhat similar answer. The plaintiff demurred to each of these answers, on the ground that it does not state facts sufficient to constitute a defense, and from the orders sustaining the demurrers defendants appeal.

Let us first consider the defense of the administrator, Michaud. Although the note is executed by him in the name of the estate, it is well settled that an administrator or executor cannot bind the estate by any promissory note he may make. Even though the note is given for a valid debt or liability of the estate which he should pay, and even though he has a right to reimburse himself out of the assets of the estate when he does pay it, still the note, though made by him as administrator, is his personal obligation, and not the obligation of the estate: 1 Daniel on Negotiable Instruments, 4th ed., sec. 262. The case is not at all analogous to one where the party signing the note is acting for a disclosed principal. An executor or administrator has no principal. "When a trustee contracts as such, unless he is bound, no one else is bound, for he has no principal. The trust estate cannot promise. The contract is, therefore, the personal undertaking of the trustee": Taylor v. Davis, 110 U. S. 330. Persons contracting in a representative capacity are liable personally when they represent no responsible principal: Story on Agency, secs. 280-286. But these are very general statements of well-established principles, which it might be easy to misapply. When a trustee executes an instrument as trustee, even though he has no principal, and does not bind the trust estate, there ought to be some good reason why the court will make for him a new contract by which he is bound personally. The doctrine that he is liable personally on such a contract is a fiction of law, which, like many other fictions of law, was invented to prevent injustice, ⁴⁶⁶ not to promote it. This fiction of law has always been applied to cases where the executor or administrator had assets in his hands which he might have appropriated to the fulfillment of his obligation, and to cases where the other party, as a consideration for the obligation of the executor or administrator, parted with something more than a mere nominal or technical consideration. But this fiction of law should not be invoked to make a new contract for the parties where the executor or administrator had no assets with which to reimburse himself, and the other party had no good reason to suppose that he had or would have such assets,

has not been misled, and has parted with nothing but a nominal or technical consideration on the faith of the administrator's promise. We can find no case which holds otherwise.

The defendant administrator attacks the complaint, and contends that it does not state a cause of action as against him. Under the rule of the law merchant, a negotiable promissory note made by an executor or administrator, as such, imports sufficient consideration to bind him personally: *Story on Promissory Notes*, sec. 63; 1 *Daniel on Negotiable Instruments*, sec. 262. For this reason, we are of the opinion that the complaint states a cause of action against the administrator. But, as against anyone but an innocent purchaser for value before maturity, the consideration for such a note may be inquired into.

At common law, except when suit was brought against him, the administrator or executor himself, and not the court, allowed or adjusted the debts of the deceased with the creditors. He paid these debts without any order of the court out of the assets of the estate, or paid them out of his own funds, and reimbursed himself out of the assets. He had the right, among creditors of equal degree, to pay one in preference to another; 2 *Williams on Executors*, Randolph and Talcott's ed., 256 (882). He might thus prefer and pay a creditor by giving his own obligation for the debt: *Hepworth v. Heslop*, 6 *Hare*, 561. When the executor or administrator, having assets of the estate applicable to the payment of the debt, gave his own note to the creditor for such debt, it amounted to an appropriation of the assets to the amount of the debt to the payment thereof; and this constituted a sufficient consideration for his promise, and he was personally liable, whether he made the note as administrator or in his own right: 1 *Daniel on Negotiable Instruments*, sec. 263. If he failed to reimburse or indemnify ⁴⁶⁷ himself it was his own fault, and no concern of the creditor. But if, without any new consideration, he gave his note for the debt of the deceased when he had no assets, there was no consideration for the note, and his promise to pay was nudum pactum: 3 *Williams on Executors*, 288-298 (1661-1674); 1 *Daniel on Negotiable Instruments*, sec. 270; *Bank of Troy v. Topping*, 13 *Wend.* 557; *Rucker v. Wadlington*, 5 *J. J. Marsh.* 238; *Byrd v. Holloway*, 6 *Smedes & M.* 199; *Rann v. Hughes*, 7 *Term Rep.* 350, note; *Ellis v. Merriman*, 5 *B. Mon.* 296; *Schoonmaker v. Roosa*, 17 *Johns.* 301; *Ten Eyck v. Vanderpoel*, 8 *Johns.* 120.

In jurisdictions where the giving of a new note for a prior indebtedness and the surrendering up of the old note which repre-

sented the prior indebtedness is an absolute payment, it is held that when the executor or administrator gives his note for the debt of his testator or intestate, whose note is surrendered up to the executor or administrator, it constitutes an absolute payment of the debt and a sufficient consideration for the new note. But this is not the law in those states where, in such a transaction, the giving of the new note would not constitute absolute payment. In referring to the case of Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61, the court in Bank of Troy v. Topping, 9 Wend. 273, says: "That case is no authority here, because the reasons are not applicable. A promissory note given in this state for a simple contract debt does not absolutely discharge such debt; the creditor may still prosecute upon the original consideration, and may recover upon producing and canceling the note. In that case, also, it appears that the defendant had assets. In the case now under consideration, the plaintiffs lost nothing by taking the defendants' notes for the note of their intestate. They might at any time have prosecuted the defendants as administrators for the money lent to their intestate, and recovered judgment, and thus have obtained any preference which the law would then have given them." In this respect the law of this state is like that of New York, and the giving of the new note in such a transaction would not be an absolute payment: See Combination Steel etc. Co. v. St. Paul City Ry. Co., 47 Minn. 207.

The respondent's counsel has cited many cases which hold that the contracts of an executor or administrator are not binding on the estate, and, although made by him as such executor or administrator, are binding on him personally. Most of these are cases where ⁴⁶⁸ the transaction originated with him, and not with the deceased, and the other party to the contract furnished the whole consideration therefor at the request of such executor or administrator. To cite from his own brief: "The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, . . . are the personal contracts of the executors, and do not bind the estate": Austin v. Munro, 47 N. Y. 360. "The action here is exclusively upon the undertaking of the defendant, importing a promise to pay the sum of nine hundred dollars on the first day of July, 1879, to the payee of the draft or his order, for a consideration received by the promisor. No facts are alleged or proved showing any liability on the part of the defendant's testator to the drawee of the draft, or any legal demand

existing in his favor against the estate represented by the defendant": *Schmittler v. Simon*, 101 N. Y. 554; 54 Am. Rep. 737. See, also, *Sumner v. Williams*, 8 Mass. 162; 5 Am. Dec. 83; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115; 38 Am. Rep. 661; *M'Eldery v. M'Kenzie*, 2 Port. 33; 27 Am. Dec. 643; *Sims v. Stilwell*, 3 How. (Miss.) 176; *Steele v. Steele*, 64 Ala. 438; 38 Am. Rep. 15; *Kingman v. Soule*, 132 Mass. 285; *Long v. Rodman*, 58 Ind. 58; *Doolittle v. Willet*, 57 N. J. L. 398. In *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36, it is said: "The true doctrine on this subject appears to be that, where the cause of action existed against the deceased, the executor or administrator may make himself personally liable by a written promise founded upon a sufficient consideration. . . . In this case the contract originated with the administrator, and there is no evidence that the debt also did not."

But the transaction set out in the answer of the administrator in the case at bar did not originate with him. He alleges that he gave the note in suit for the debt of the testator. An administrator, under the law of this state, has no assets of the estate which he can apply to the payment of a debt of the deceased, unless the claim has been allowed by the probate court. He does not allow such claims and has no discretion as to the order or priority of payment of such claims. The probate court allows and orders the claims paid, and he is the mere depositary of the funds for payment. Then the doctrine of the common law that assets of the estate in the hands of an administrator or executor are sufficient consideration for his promise to ⁴⁶⁹ pay the debt of the intestate or testator can have no application here, and there can be no presumption that such executor or administrator has such assets. Then we cannot see that Michaud would be liable on his note, even if the debt in question had not been barred as a claim against the estate before he so gave his note for it. The reasons by which we reach this conclusion are in conflict with the reasons given for the decision of *Brown v. Farnham*, 55 Minn. 27; but we are of the opinion that the result arrived at in that case is correct. The question of the liability of the executor arose on a demurrer to the complaint. It appears from the complaint that Farnham and Lovejoy were partners, and, as such, owed the plaintiff twelve thousand dollars. After Lovejoy's death, his executors and the surviving partner, Farnham, continued and carried on the partnership business under the old firm name of Farnham & Lovejoy. The executors, acting with the surviving partner, presumably meddled with and diverted assets of the old firm,

which the surviving partners should have applied in payment of the plaintiff's debt. But, instead of doing this, the executors joined with Farnham in executing to plaintiff their note for his debt, not in their official name as executors, but in the name of Farnham & Lovejoy. They subsequently joined with Farnham in executing a composition agreement with the creditors of the old firm of Farnham & Lovejoy, which agreement they failed to perform. Surely, under these circumstances, it should not be presumed that there was no consideration for the undertakings of these defendants in these matters, merely because they were executors of the estate of Lovejoy.

Both parties have argued the demurrer to this answer on the theory that the only question is whether or not the administrator has, by the note in suit, bound himself personally to pay the debt of his testator; while it seems to us that the answer clearly shows that this debt had ceased to be a debt of the testator or a liability against his estate long before the administrator signed the note in suit. If this is true, he could not (as could the original debtor) by his promise, without a new consideration, revive a debt barred by the statute of limitations. But the answer alleges that, at the time of his death, the testator was under guardianship, and plaintiff then held the notes of the guardians for this debt; that, when the note in suit was made, plaintiff "still held the said notes of said guardians or a note ⁴⁷⁰ given solely in renewal of the same"; and that this was the debt for which the note in suit was given. The answer of the administrator can be considered only as a plea of want of consideration for the making of the note in suit, but it does not appear by his answer that the debt in question did not continue to be a valid debt against the guardians or the person or persons who made the note "given solely in renewal" of their note. The burden was on the defendant to show want of consideration for his note, but he has not shown that the debt did not continue to be the debt of some one else after it had ceased to be the debt of the estate of Langevin. Whether or not the guardians could, by their note, without a new consideration and without assets, bind themselves to pay the debt of their ward, we need not consider. The probate court may have provided for that purpose assets which they already had in their hands, or they may have received a new consideration for the making of the note, or the consideration for it may have originally been received by them as guardians, and not by the ward before guardianship. The defendant has not shown that there was no consideration for any of those prior notes, and we must

presume that there was a sufficient consideration for them. Then it must be held that the note in suit was not given for a debt of the estate or of the testator, but a debt of these guardians or of those who made a note in renewal of their notes. Then the question resolves itself into this: Has the defendant administrator, by the note in suit, become bound to pay the debt of these third parties? It does not appear by his answer whether or not, as a consideration for the note in suit, the time of payment of this debt has been extended. Such extension of the time of payment would be a sufficient consideration for the promise of a surety, if this can be considered such a promise: See *Nichols etc. Co. v. Dedrick*, 61 Minn. 513. It is not alleged in the answer that no such extension was given, and, if such extension would be a sufficient consideration for the note in suit, it must be presumed that it was given. But, while such consideration is sufficient to support the promise which the party intended to make, we are of the opinion that it is not a sufficiently adequate consideration to warrant the court in making a new contract for the parties, and, by a fiction of law, hold the administrator liable on a promise which he never intended to make. We cannot see that the words "or either of us," 471 in the note in suit, after the words, "the estate of E. Langevin," have any tendency to show that the defendant administrator intended to bind himself personally.

For these reasons, we are of the opinion that the answer of the administrator stated a good defense, and that the court below erred in sustaining the demurrer to the same.

But the other defendants promised in their own right, and, from what we have said, there may be sufficient consideration, by such an extension of the time of payment of the debt, to support their promise. These defendants allege nothing that is not alleged in the answer of the administrator, and, while they do not allege as much as is alleged in that answer, still they refer to that answer, and make it a part of their own. Whether this is an irregular mode of pleading we need not consider. No objection is taken to it, and we shall, therefore, regard both answers as substantially the same. We are, therefore, of the opinion that the answer of these other defendants states no defense.

This disposes of the case. The order appealed from, so far as it sustains the demurrers to the answer of the defendant Achille Michaud, is reversed, and, so far as it sustains the demurrers to the answer of other defendants, is affirmed.

EXECUTORS AND ADMINISTRATORS—POWER TO BIND ESTATE BY NOTE.—That an executor or administrator cannot bind the estate by the execution of promissory notes, see the extended note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 121.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

NOWACK v. BERGER.

[133 MISSOURI, 24.]

WILLS, DEVISEES' INTEREST, WHEN NOT AFFECTED BY TESTATOR'S AGREEMENT TO DEVISE TO ANOTHER.—Where a testator had agreed to give his stepson a share in his estate as if he were his own son, but, instead of doing so, gave him nothing, devising certain property to his children and the stepson brings a suit for specific performance of the contract in his favor, and recovers judgment, this does not destroy or impair the devise to his children, because the interest which he has by his agreement may be set apart to him without impairing the devise to them.

WITNESS, COMPETENCY OF, WHEN A PARTY TO A CONTRACT AFTER THE DEATH OF THE OTHER.—Under the statutes of Missouri, a wife is not, after the death of her husband, a competent witness to prove an antenuptial contract between them, in a suit by her son against the personal representative and heirs of her husband to enforce a provision of such contract in favor of such son.

ADOPTION OF CHILD, SPECIFIC PERFORMANCE OF CONTRACT FOR.—An antenuptial contract to the effect that the husband shall take as his child the child of the intended wife and give it the same share in his estate after his death as if it were his own child, followed by the intended marriage, and the going of the child into his family and rendering him the same obedience and services as if it were his own child, will be specifically enforced in equity, though the property held on his death includes both real and personal estate.

STATUTE OF FRAUDS.—Contracts in consideration of marriage are not void by the statutes of Missouri, though those statutes prohibit any action from being brought thereon.

STATUTE OF FRAUDS.—Though a parol antenuptial contract is invalid when made solely in consideration of marriage, such contract may stand if, in addition to its marital portion, it has another feature, the performance of which may be reckoned a part performance, provided there is reliance on such additional feature, and it is sought to be made the basis for specific relief.

CONTRACTS—CONSIDERATION.—MARRIAGE is a valuable consideration and the highest known to the law.

STATUTE OF FRAUDS—PART PERFORMANCE.—MARRIAGE is not, as between the parties, such part performance as to take a contract out of the statute of frauds, but, if followed by cohabitation, the courts of Missouri are inclined, in favor of the wife, to regard it as a part performance, or, at least, as entitling her to specific performance of a parol promise made before the marriage by her intended husband.

Suit against the executors of E. H. Schweer, and other persons, for the specific performance of an agreement entered into between him and the mother of the complainant in contemplation of marriage, to the effect that upon such marriage the complainant should be adopted and received as a child of the decedent, and perform to him the duties of a child toward its father, and, on the death of the latter, should receive such share in his estate as any of his natural children should receive if he were to die intestate. The marriage was subsequently solemnized, and the complainant, during all of his childhood and until his marriage, performed to the decedent the duties owing from a child to its parent. By his last will, however, the decedent failed to keep his agreement, giving nothing whatever to the complainant, but devising to his children a tract of land on which the complainant lived. At the trial, complainant's mother was offered as a witness to prove the antenuptial agreement between herself and her deceased husband, on which the complainant relied. Thereupon, it was objected that she was made incompetent as a witness, for that it appeared by section 8918 of the Revised Statutes of 1889, of the state, declaring that in actions where one of the original parties to the contract in issue is dead, the other party to such contract shall not be permitted to testify in his own favor. This objection was sustained. The trial court entered its decree in favor of the complainant, but depriving his minor children of the lands devised to them.

Kiskaddon & Meyer and John W. Booth, for the appellants.

Robert Walker, for the respondent.

35 SHERWOOD, J. 1. The testimony of Frederick and Henrietta Kotwitz (at whose house Augusta Nowack was then living with her illegitimate son, the plaintiff, then some two years old) abundantly sustains the allegations of the petition as to the nature, terms, and scope of the agreement entered into between Eberhard H. Schweer, deceased, and said Augusta. There was no evidence to the contrary, and the lower court, after findings suitable to the occasion, decreed that "a child's share, or the one-

fourth part, of all the estate and property of the said Eberhard H. Schweer be decreed to plaintiff, subject to the right of dower of the widow, the defendant, Augusta Schweer, in all the real and personal estate; that all the estate and property left by the said Schweer at his death is hereby declared in trust, to be distributed as follows:

"That plaintiff receive the one-fourth part thereof, ³⁶ subject to the right of dower of the widow aforesaid, and that this one-fourth part comprise the land on which he now resides, and which, by the last will of said Schweer, was given to plaintiff's children, and the balance of all property and estate be divided as directed in the last will of said Schweer, and that, for the purpose of dividing said property, contribution is hereby ordered of the defendants, Henry E. Schweer, Fred W. Schweer, and Ferdinand Schweer, in proportion to the value and amount of property respectively given to each of them in said will, and that the executor of said Eberhard H. Schweer be adjudged to pay the costs incurred in this suit out of the estate of said Eberhard H. Schweer."

Inasmuch as the circuit court did not find plaintiff entitled to specific performance of the additional contract made with plaintiff, as alleged in the second count in his petition, and did not decree performance thereof, and inasmuch as he is content with, and does not appeal from, the decree, it is unnecessary to consider the correctness of the ruling which omitted to specifically perform such additional contract.

But while this is true, and while plaintiff is in no position to complain, yet it is otherwise as to the minor defendants, his children. To them, the will of Schweer gave the farm on which plaintiff resided, and on which he had thus lived for some ten years at the time of Schweer's death.

The contract made between plaintiff's mother and Schweer only entitled plaintiff to one-fourth of whatever property, real and personal, Schweer had at the time of his death. Under such a contract, however, he was not entitled to have his share assigned in any particular portion of the property thus left. But his minor heirs were entitled to just what was devised to them by Schweer, estimated to be worth not over ³⁷ twelve hundred dollars. Of this right, derived from the will of Schweer, they could not lawfully be deprived, even if the deposition of Frederick Kotwitz, taken before they were made parties to the proceeding, and which tended to prove the original contract, could have been received against them. That portion of the decree which sought to deprive these minors of their rights under the will, or rather

which ignored those rights altogether, is therefor erroneous, and cannot be permitted to stand.

As we understand the decree, although it is not entirely unambiguous, it provides, substantially, for the specific performance of the contract mentioned in the first count in plaintiff's petition, and, in so far as it does this, it is correct, and incorrect only to the extent already stated. If the points to be presently passed upon are ruled in plaintiff's favor, a decree, however, can be entered in this court which will put matters in proper shape in reference to the rights of all concerned.

2. The ruling was proper which denied the admissibility of Augusta Nowack as a witness. She was a party to the contract as well as to the cause of action, and, by reason of this, was incompetent: *Wendover v. Baker*, 121 Mo. 273, and cases cited; *Lins v. Lenhardt*, 127 Mo. 271; *Chapman v. Dougherty*, 87 Mo. 617; 56 Am. Rep. 469; *Meier v. Thieman*, 90 Mo. 433; *Berry v. Hartzell*, 91 Mo. 132; *Leach v. McFadden*, 110 Mo. 584; *Messimer v. McCray*, 113 Mo. 382.

3. Such contracts as the one here in litigation, in so far as they relate to the adoption of a child and making him an heir, etc., have often been recognized and enforced in this state and elsewhere: *Sutton v. Hayden*, 62 Mo. 101; *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250; *Leach v. McFadden*, 110 Mo. 584; *Healey v. Simpson*, 113 Mo. 340; *Teats v. Flanders*, 118 Mo. 669.

4. It thus comes to be considered whether the contract now under consideration, owing to the peculiar circumstances attendant on its making, will prevent that feature of it mentioned in the next preceding paragraph from being specifically performed.

It is urged here, as in the court below, that the contract between Augusta Nowack and Eberhard H. Schweer being made "in consideration of marriage," and not being in writing, is void by reason of the provisions of section 5186 of the Revised Statutes of 1889; but this is an erroneous view of that section, because it does not make a contract in consideration of marriage void, but merely prohibits any action from being brought thereon, unless such contract "shall be in writing," etc: 1 *Bishop on Married Women*, sec. 807.

There have been in England and in this country many decisions on the statute in question, involving the point now in litigation; but it seems to be settled by the weight of authority that

though a parol antenuptial contract is invalid when made solely in consideration of marriage, yet that such contract can stand, if, in addition to the marital portion thereof, it has another feature, the performance of which may be reckoned part performance, and thus prevent defeat of the antenuptial agreement because of not being in writing; provided there was reliance on the promise which is made the basis for specific relief: *Taylor v. Beech*, 1 Ves. Sr. 297; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Browne* on the Statute of Frauds, 5th ed., secs. 217, 459 a, and cases cited; *Fry on Specific Performance*, 3d ed., sec. 595; 2 *Parsons on Contracts*, 7th ed., 77, and cases cited; *Agnew* on the Statute of Frauds, 124; *Dygert v. Remerschnider*, 32 N. Y. 629; *Riley v. Riley*, 25 Conn. 154; 1 *Bishop on* ³⁹ *Married Women*, sec. 807; *Throop's Verbal Agreements*, sec. 708.

Here, Schweer, upon marriage to Augusta Nowack, would not have been entitled to the custody, service, and earnings of plaintiff, but for the latter being surrendered to Schweer by his mother in furtherance of the parol agreement to that effect: *Schouler on Domestic Relations*, 5th ed., sec. 273.

This agreement being proved as aforesaid, and it having been also complied with, as shown by the testimony, on the part of plaintiff, supplies such independent, additional, and valuable consideration as will, under the authorities cited, amount to part performance and take this case out of the purview and operation of the statute of frauds.

Although there is testimony that plaintiff, while about seventeen years old, on one occasion struck his stepfather with a stove-lid lifter on the head, yet great provocation is shown for this in that Schweer had called plaintiff's mother a prostitute. Evidently, Schweer did not regard plaintiff a very undutiful or bad boy, or else his conduct some three years thereafter in promoting the marriage of plaintiff with Bartlett's daughter was very reprehensible conduct.

5. But the agreement between the parties may be looked at from an entirely different point of view. On all hands it stands confessed that marriage is a valuable consideration. Lord Coke says: "If a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word [heirs]; for there is no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity": *Coke on Littleton*, 9 b. Elsewhere it is said: "Marriage is the highest consideration known in law": *Johnston v. Dilliard*, 1 Bay, 232. See, also, 4 *Kent's Commentaries*,

465; 1 Bishop on Married Women, ⁴⁰ secs. 27, 775; Ford v. Stuart, 15 Beav. 499; Greene v. Cramer, 2 Con. & L. 60; Fraser v. Thompson, 1 Giff. 62. Marriage is regarded as one of the strongest considerations in the law, either to raise a use, found a contract, gift, or grant: Holder v. Dickeson, Freem. 96; Smith v. Stafford, Hob. 216 a; Waters v. Howard, 8 Gill, 262.

In a case which arose in Maryland it was held that an agreement made by a father with his daughter in consideration of her marriage, and by way of advancement and marriage endowment, consummated by marriage as then contemplated, could not be revoked by the father, Martin, J., saying that the daughter was regarded as a purchaser, as much so as if she had paid for the property an adequate pecuniary consideration, and that the consummation of the marriage was to be considered as the payment of the purchase money: Dugan v. Gittings, 3 Gill, 138; 43 Am. Dec. 306.

A similar ruling was made where the father promised a man about to marry his daughter that on the marriage he would give him a sum of money, and the marriage having occurred, the father was compelled specifically to perform his promise: Chichester v. Vass, 1 Munf. 98; 4 Am. Dec. 531.

Yet, notwithstanding this, it is ruled that as between the parties to the wedlock, the celebration of the marriage is not such part performance as to take it out of the statute: 2 Parsons on Contracts, 7th ed., *72; Fry on Specific Performance, 3d ed., sec. 593.

Commenting on this anomaly in equity jurisprudence, Judge Story says: "The subsequent marriage is not deemed a part performance taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own grounds": 2 Story's Equity Jurisprudence, 13th ed., sec. 768. See, also, note to ⁴¹ Throop's Verbal Agreements, sec. 720, and cases cited, among them Durham v. Taylor, 29 Ga. 166.

"But though marriage be not, cohabitation may be a sufficient act of, part performance. In a separation deed, the husband covenanted with a trustee for the payment of an annuity to his wife; shortly before the death of the husband, his wife returned to him upon the faith of a promise made by the husband to the wife and her trustee, that if she would do so he would continue to pay the annuity and would charge it upon his real estate. He died without having done so, and it was held that the contract could be enforced against the devisees of the husband, on the ground of

part performance": Webster v. Webster, 1 Small & G. 469; affirmed, 4 De Gex, M. & G. 437; Fry on Specific Performance, sec. 597.

This divergence between marriage and other valuable considerations in respect to the doctrine of part performance caused Vice-Chancellor Malins to express his regret that such an exception was ever made: Ungley v. Ungley, L. R. 4 Ch. Div. 73; Coles v. Pilkington, L. R. 19 Eq. 174.

In a case which came to the house of lords, where the old rule that marriage was not part performance was in terms (though unnecessarily) reasserted, Lord Cottenham very forcibly presented the equitable ground for the contrary opinion, remarking: "The principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal": Hammersley ⁴² v. Baron de Biel, 12 Clark & F. 45, loc. cit. 78, 79.

The true basis of specific performance being enforced is, that unless enforced it would operate a fraud on the party who seeks its enforcement, it being impossible to restore such party to his statu quo: Browne on the Statute of Frauds, secs. 448, 487, and cases cited; 2 Story's Equity Jurisprudence, sec. 761, and cases cited.

"The fraud," says Judge Wells in Glass v. Hulbert, 102 Mass. 35, 3 Am. Rep. 418, "most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss."

Now it would seem that marriage being such a valuable consideration, its celebration in conformity to previous parol promise made, placing, especially, as it does, the female contracting party in a situation where she cannot be restored to her former condition, ought to be regarded as such an heinous fraud upon her,

if such parol promise be not performed, as a court of conscience should not tolerate, but, acting on principle rather than precedent, should decree the complete enforcement of such agreement, notwithstanding the statute. This is what courts of equity are doing in other cases, every day, despite the statute, and no sound reason can be urged why a court of equity should grant relief in the latter class of cases and refuse it in the former. Indeed, more cogent reasons appear to ⁴³ exist in favor of disregarding the statute in instances like the present, than in ordinary cases. This view of the matter is also entertained by the learned author heretofore cited: Browne on the Statute of Frauds, sec. 459.

Instances are by no means infrequent where contracts between husband and wife, entered into before marriage, will be enforced in equity, although they should be avoided at law; "for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract": 2 Story's Equity Jurisprudence, sec. 1370, and cases cited.

6. For these reasons, inasmuch as we are not hampered by former rulings in this court on this point, we hold that marriage, in the circumstances disclosed by the record, does amount to a valuable consideration, and part performance, and that plaintiff having done on his part all that it was contracted by his mother he should do, the contract made by his mother for herself and for him having been fully executed on their parts this constitutes of itself a distinct and independent reason why the statute should not be allowed to obstruct the pathway to the relief plaintiff seeks.

7. The premises considered, a decree will be entered in this court in favor of plaintiff in accordance with the facts found by the lower court, giving to him one-fourth of all the real and personal estate left by Eberhard H. Schweer, and requiring contribution on the part of the three sons of Schweer; but this will be done, subject, of course, to the rights of the widow as directed by the will.

And, further, the decree must accord to the minor heirs of plaintiff what the will has directed should be theirs; but, of course, the devise to them cannot be permitted to diminish what plaintiff became entitled to under the agreement made by his mother with Schweer. Plaintiff will take in value, in real and personal property, ⁴⁴ precisely what he would have taken had his children not been mentioned in the will, to wit, the one-fourth part in value of all real and personal property of which Schweer died seised. Inasmuch, however, as those heirs have been com-

pelled to come to this court in order to secure their rights, the costs of this appeal, as between them and their father, will be taxed against him.

All concur.

WITNESSES—COMPETENCY AFTER DEATH OF OTHER PARTY TO CONTRACT.—The surviving party to a transaction will not be permitted to testify against a deceased party or his assignee or representative, on the ground that others were jointly interested with the decedent in the transaction, if none of them participated in the transaction or are able to testify concerning it: *Harris v. Bank*, 22 Fla. 501; 1 Am. St. Rep. 201, and note. The death of the vendor in a parol contract to convey renders the vendee incompetent to testify as to improvements made by him upon the land: *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769. See, also, the note to *Gage v. Phillips*, 37 Am. St. Rep. 501.

ADOPTION—SPECIFIC PERFORMANCE.—If a young child is given by its parents to its aunt and uncle to be as their own, under an agreement to adopt and rear it, to nurture and educate it, and at their death to leave it all their property, and it takes their name, not knowing its own parents, and lives with them for years, until they die possessed of real property, which they do not, either by deed or will, transfer to it, there is such a part performance by the parties as will entitle the child to a decree giving it the title to the property by way of specific performance of the contract: *Kofka v. Rosicky*, 41 Neb. 328; 43 Am. St. Rep. 685, and note.

CONTRACTS.—MARRIAGE IS A VALUABLE CONSIDERATION: *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Gurvin v. Cromartie*, 11 Ired. 174; 53 Am. Dec. 406, and note. A contract is not void under section 2307 of the Revised Statutes of Wisconsin because its consideration was the marriage of the parties, if the marriage is but an incident of the contract, and it is supported by a sufficiently valuable consideration aside from the marriage: *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404, and note. See, especially, the extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 741.

STATUTE OF FRAUDS—MARRIAGE AS PART PERFORMANCE.—A parol promise made in consideration of marriage is void by the statute of frauds, and the marriage is not such a part performance as will take the case out of the statute: Extended note to *Christy v. Barnhart*, 53 Am. Dec. 544.

SCHARFF v. MEYER.

[133 MISSOURI, 428.]

SALE, DELIVERY TO CARRIER.—As a general rule, the delivery of goods by a vendor to a carrier, or the master of a vessel, is equivalent to a delivery to the purchaser, subject only to the right of stoppage in transit. Especially is this true when, by the terms of the contract of sale, the goods were to be delivered to the carrier. *Prima facie*, the title vests in the purchaser on such delivery.

SALE, DELIVERY TO CARRIER—HOW TO PREVENT TITLE FROM VESTING.—If the seller and vendor of goods wishes to prevent the title from vesting in the vendee and consignee, and delivers them to the carrier, he must, by bill of lading, make the goods deliverable to his own order.

SALE FOR CASH, TITLE, WHEN VESTS BEFORE PAYMENT.—Though when a sale is made for cash, the title ordinarily remains in the vendor until payment is made, such payment is waived as a condition precedent to the vesting of title in the consignee where the goods are shipped to him without any intention, so far as appears from the evidence, to retain title until they are paid for.

SALE, RESERVING POSSESSION OF BILL OF LADING.—The fact that the vendor of goods on shipping them retains possession of the bills of lading cannot affect the title to the property, which has already passed by its delivery to the carrier.

SALE, WHEN COMPLETE.—The fact that the vendee reserves the right to examine and approve the property shipped to him is not a condition in favor of the vendor, and therefore does not amount to the reservation of the title by him until such examination and approval.

COMMON LAW, WHEN NOT ABROGATED BY STATUTES—BILLS OF LADING.—A statute providing that the indorsement and delivery of bills of lading shall pass title to the property represented thereby does not restrict the mode of transfer, and such transfer may, therefore, be accomplished by the delivery of such bills of lading for valuable consideration without indorsement.

MARSHALING SECURITIES—CREDITORS HAVING TWO FUNDS OR LIENS.—If goods have been transferred to a creditor by the delivery of bills of lading representing them, and thereafter they are attached by another creditor of the transferor, the former, though he has other securities, cannot be compelled to exhaust them before resorting to the goods. These circumstances do not present a case of two persons having a lien on the same property, and one of them having another security, also, for, because of the transfer before the levy of the attachment, the property never became subject to the attachment lien.

Phillips, Stewart, Cunningham & Eliot, for the appellants.

T. K. Skinker, for the interpleader, respondent.

435 **BURGESS, J.** This is an action by attachment. Under the writ, 619 barrels of sugar were seized as the property of defendants. The sugar was sold under order of the court, and the proceeds arising from said sale paid into court. The Union Na-

tional Bank, of New Orleans, interpleaded, claiming the fund. The controversy is between the plaintiffs, as attaching creditors, who seized the sugar by attachment as the property of V. & A. Meyer & Co., while on the vessel upon which it was shipped, and the interpleader, who claims the fund under assignment of the drafts, and transfer of the bills of lading for the sugar. The trial was had before the court, who found for the interpleader, and plaintiffs appealed.

No question is made with respect of the pleadings, or the admission or exclusion of evidence. The facts are about as follows: Defendants, who were merchants at the city of New Orleans, having, through their broker, theretofore ⁴³⁶ sold fourteen different lots of sugar to as many different purchasers in the city of St. Louis, on the thirtieth day of November, 1890, shipped it to them in compliance with their contracts. The carrier issued to defendants bills of lading, in which they were named as the shippers, and the several purchasers named as consignees.

Defendants then drew a separate draft on each of the consignees for the value of the sugar shipped to them. The drafts were drawn payable to defendants' order, and were indorsed by them. To each draft was attached the corresponding bill of lading, and, on the 1st of December, 1890, all the drafts, with the bills of lading attached, were transferred and delivered to the interpleader for their full face value, and the full aggregate value of all the sugar, being about \$10,000. On presentation of the drafts to the respective drawees, payment was refused, and they were not paid. The drafts are in the ordinary form of bills of exchange. They are all dated at New Orleans, December 1, 1890, are drawn by V. & A. Meyer & Co. The bills of lading were not indorsed.

The bills of lading are dated at Cora Plantation, Louisiana, November 30, 1890, and it is recited on the face of each of them that the shipment is for account of V. & A. M. & Company. They are all in the following form:

"Received in good order from Cora Plantation on board the steamer City of St. Louis . . . to be delivered without delay, unless unavoidably prevented, on the levee at St. Louis unto consignee as below. . . .

437 "Freight at 15c per 100 lbs.

MARKS.	ARTICLES.	CONSIGNEE.	WHOSE ACCOUNT.	WEIGHTS.
Nina Y. C., No. 15.	Fifty-three barrels Y. C. sugar.	Fink & Nasse, St. Louis.	V. & A. M. & Company.	17,339.

There are fourteen of the bills of lading, each naming as consignee one of the concerns against whom the drafts were drawn.

Along with each of the bills of lading is a certificate dated at Cora Plantation, November 29, 1890, showing the weight of each barrel, and the gross weight and net weight of each lot. There was also pinned to each of the bills of lading a slip of paper, on which were written the words: "Allow parties to have B-L and examine goods."

It appears that on the 1st of December Adolph Meyer, a member of the firm of V. & A. Meyer & Co., took these fourteen drafts, with the bills of lading and other papers attached, into the Union National Bank and requested a discount; that Chalaron, the cashier, accepted them at the current rate of discount for St. Louis exchange, one-fourth of one per cent (or \$24.29 in the aggregate), and caused the net proceeds, \$9,719.91, to be placed to the credit of Meyer & Co. in their account current; that the bank paid checks of Meyer & Co. on their account current to the amount that day of \$39,772.21, the next day \$70,277.27, and each succeeding day for greater or less sums; that from the day when the fourteen drafts above mentioned were delivered to the bank, up to and including the day when they were dishonored at St. Louis and the Union National Bank ⁴³⁸ was notified, the defendants had on deposit in the bank and to their credit more than enough money to pay all these drafts; that after that time there were, up to December 25th, of that year, daily balances to defendants' credit, on most days more than sufficient, though on six of those days not sufficient, to pay all the drafts.

When the deposition of Mr. Chalaron was taken on February 5, 1891, there was still more than enough money on deposit to the credit of the defendants to pay all the drafts; that this discount was made in the usual and ordinary course of business, and on the faith of the bills of lading and certificates of weight, and not on the personal credit of Meyer & Co; that the transaction was an out and out purchase, and that the drafts were not taken for collection for account of Meyer & Co.

It also appears that the drafts were received by the St. Louis National Bank, from the Union National Bank and with the other papers attached presented to the several drawees for payment, and payment refused.

The contracts, in pursuance of which the shipments were made, are all dated at St. Louis and call for Y. C. (yellow clarified). Their terms are as follows:

"1. F. Mitchell & Bro: Price 5 cents delivered on the levee here; to be drawn for, bill of lading attached; sugar to be received before payment of draft.

"2. Wulfig, Dieckriede & Co: Price 5 cents delivered here; to be drawn for subject to examination of sugar before payment.

"3. Adolph Moll: Price 5 1-8 delivered here on the levee by next Saturday's boat from New Orleans.

⁴³⁹ "4. O. H. Peckham Candy Co: Price 5 cents delivered here; to be drawn for bill of lading attached; bill of lading to be surrendered by bank so sugar may be received in the usual way.

"5. Goebel, Wetterau & Co: Price 4 7-8 sold at plantation; to be shipped Anchor Line and insured; to be drawn for bill of lading attached; sugar to be examined and received in the usual way before payment.

"6. Dodge & Seward: Price 4 7-8, f. o. b. plantation; ship Anchor Line and insure; to be drawn for bill of lading attached; subject to approval before payment.

"7. Alkire Grocery Co: Price 4 7-8 f. o. b. plantation; ship Anchor Line and insure; to be drawn for bill of lading attached; sugar to be accepted before payment of draft.

"8. Scudder, Miltenberger, Reinhart & Co: Price 4 7-8, f. o. b. plantation; ship Anchor Line; no insurance; to be drawn for bill of lading attached; sugar to be accepted before payment.

"9. Gildehaus, Wulfig & Co: Price 4 7-8, f. o. b. plantation; ship Anchor Line and insure; to be drawn for subject to approval of goods before payment.

"10. Greely-Burnham Grocer Co: Price 4 7-8 sold at plantation; ship Anchor Line and insure to be drawn for bill of lading attached; bill of lading to be surrendered by bank so the sugar may be received in the usual way.

"11. J. H. Kaiser & Co: The same as in No. 10.

"12. Adam Roth Grocery Co: The same as in No. 10.

"13. Goddard-Peck Grocery Co: Price 4 7-8, f. o. b. plantation; ship Anchor Line; no insurance; cash on receipt of sugar.

⁴⁴⁰ "14. Fink & Nasse: 4 7-8 per pound, f. o. b. 12 1-2 cents freight to St. Louis; cash on arrival."

It also appears that some of the sugars were sold subject to approval by the purchasers before payment.

Plaintiffs gave in evidence sections 2482 and 2485 of Voorhies' Revised Statutes of Louisiana of 1876, which read as follows:

"Sec. 2482. Cotton-press receipts given for any goods, wares, merchandise, grain, flour, or other produce or commodity stored or deposited with any cotton press, wharfinger, or other person, or any bill of lading given by any forwarder, boat, vessel, railroad, transportation, or transfer company, may be transferred by indorsement therein, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour, or other produce or commodity therein specified, so far as to give validity to any pledge, lien, or transfer, made or created by such person or persons, but no property shall be delivered except on surrender and cancellation of said original receipt or bill of lading with the indorsement of such delivery thereon; in case of partial delivery, all cotton-press receipts or bills of lading, however, which shall have the words 'not negotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this section."

"Sec. 2485. All receipts, bills of lading, vouchers, or other documents, issued by any cotton-press owner or lessee, wharfinger, forwarder, or other person, boat, vessel, railroad, transportation, or transfer company, as by this act provided, shall be negotiable by indorsement in blank or by special indorsement, in the same manner, and to the same extent, as bills of exchange and promissory notes now are."

⁴⁴¹ It further appears that the defendants, V. & A. Meyer & Co., were, and for some time before these transactions had been, and thereafter remained, depositors in the Union National Bank, and that one of the firm, Adolph Meyer, who transacted the business of the firm with the bank, then was, and for some time had been, a stockholder and a director and the vice-president of that bank.

The following articles of the by-laws of the Union National Bank were also read in evidence:

"Art. 20. All notes discounted by the bank that are not taken up before the closing of the bank on the last day of grace shall be charged to the account of the parties to the same, provided there are funds in the bank to the credit of such person or persons."

"Art. 8. If any bill or note belonging to this corporation shall not be paid before the closing of the bank on the last day of

grace, such bill or note shall be forthwith protested; and, while such bill or note remains unpaid, no discount or accommodation shall be granted, to any drawer, acceptor, or indorser of the same. No note or bill held by this bank as collateral security shall be discounted by the bank until the note or bill for which it is pledged shall be paid."

"Art. 16. The bank shall take charge of the cash, notes, or bills of exchange of such persons who may place them there, as the directors or officers may think proper, free of expense and shall keep them there subject to their order."

"Art. 21. All notes discounted to meet the payment of any note or bill due to the bank shall not be drawn for nor applied to any other purpose whatever."

Interpleader gave in evidence the following statutes of the state of Louisiana (Voorhies' Rev. Civ. Code, 1889):

⁴⁴² "Art. 2210. Compensation takes place, whatever be the causes of either of the debts, except in case: 1. Of a demand of restitution of a thing of which the owner has been unjustly deprived; 2. Of a demand of restitution of a deposit and of a loan for use; 3. Of a debt which has, for its cause, ailments declared not liable to seizure."

"Art. 2956. The depositary cannot withhold the thing deposited on pretense of a debt due to him from the depositor on an account distinct from the deposit, or by way of offset. But he may retain the deposit until his advances are repaid, as well as any other claims which he may have arising from the deposit."

Chalaron, the cashier of the interpleader, testified that section 20 of the by-laws was considered a dead letter; that the decisions of the courts of Louisiana make it so, and that the bank has sustained loss by reason of its inability to enforce it. Kohn, the president of the bank, testified substantially to the same effect.

The court, at the instance of the interpleader, gave the following declaration of law: "The court declares the law to be, that if the court shall find from the evidence that the Union National Bank in good faith bought from Meyer & Co. the draft read in evidence, with the bills of lading attached, and, relying upon the security of said bills of lading, placed to the credit of said Meyer & Co. in their account current, the price paid for said drafts, being the face value of the drafts less a small sum retained by the bank for interest and exchange, then the said bank acquired title to the sugars specified in said bills of lading, and the finding and judgment must be for the interpleader."

The court, at the instance of the plaintiffs, gave the following

declaration of law: ⁴⁴³ "If the court, sitting as a jury, believes from the evidence that the drafts put in evidence were not sold bona fide by V. & A. Meyer & Co. to the Union National Bank of New Orleans, but were understood between said firm and said bank to be placed in the hands of said bank merely for collection by or through said bank as the agent of said firm, and that the bills of lading put in evidence were merely sent along with said drafts for purposes of enabling said bank, or its St. Louis correspondents, to collect said drafts for the benefit of said firm, then you will find for the plaintiffs."

The plaintiffs requested the court to give the following declaration of law, which was refused: "If the court, sitting as a jury, believes from the evidence that at the time when the interpleader, the Union National Bank, was advised of the dishonor at St. Louis of the drafts put in evidence, the said bank had on deposit to the credit of the firm of V. & A. Meyer & Co., money sufficient to pay said drafts, and that, according to the laws of Louisiana and the by-laws of said bank in force at that time, said bank had the right to pay said drafts out of said deposit, and if the court, sitting as a jury, further believes that said bank was at that time advised of the plaintiff's claim and attachment upon the sugars covered by the bills of lading put in evidence, then in such case it was the duty of said bank to the plaintiffs to pay said drafts out of said deposit, and your verdict must be for the plaintiffs."

Plaintiff's first contention is, that the title to the sugar passed, when delivered on board the boat at the Cora Plantation, Louisiana, to the vendees, under the original contracts of sale; that the bills of lading were necessarily made to the vendees as consignees; that they were not assignable or negotiable without indorsement; ⁴⁴⁴ that they were not indorsed, and the vendors were without authority to either indorse or negotiate them; and that, by merely attaching them to drafts for which credits were received, the vendors neither did nor could transfer title to the sugar, and therefore the sugar, and all proceeds thereof at the time of the attachment, did not and do not belong to the interpleader, and that, as the evidence shows that the title is not in the interpleader, it cannot recover. Upon the other hand, the interpleader contends that the delivery of the bills of lading to it passed to it the title to the sugar, notwithstanding they were made out in the name of the St. Louis merchants as consignees, and were not indorsed by them.

While plaintiffs occupy the position of claiming that the sugar

in question was not defendants' when the interpleader claims to have acquired it by transfer of the bills of lading on the first day of December, 1890, but was defendants' when subsequently attached by them, it needs no citation of authority to show that the interpleader must recover, if at all, upon the strength of his own title; that is, the interpleader must show title to the sugar, otherwise it is not entitled to the fund arising from its sale.

As a general rule, the delivery of goods by the vendor to the carrier or master of a vessel, when the goods are to be sent in that way, is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu: 2 Kent's Commentaries, *499; *State v. Wingfield*, 115 Mo. 428; 37 Am. St. Rep. 406; *Kerwin v. Doran*, 29 Mo. App. 397; *Garbracht v. Commonwealth*, 96 Pa. St. 449; 42 Am. Rep. 550; *Dunn v. State*, 82 Ga. 27. Especially is this so when, by the terms of the contract of sale, the goods are to be delivered to the carrier.

By the terms of the contracts in the case in hand, all sugar excepts lots 1, 2, 3, and 4, were to ⁴⁴⁵ be delivered on board of boat at Cora Plantation, and all sugars delivered to the carrier in pursuance of said contracts were, in legal contemplation, delivered to the consignees, and prima facie the title vested in them immediately on such delivery. It is so held in *Hening v. Powell*, 33 Mo. 468, and *Armentrout v. Railroad*, 1 Mo. App. 158, and those cases are in accord with the great weight of authority.

"It is well settled that the delivery of goods to a common carrier, a fortiori to one specially designated by the purchaser for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases, the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent, the latter, in employing the carrier, being considered as an agent of the former for that purpose": 1 Benjamin on Sales, Kerr's ed., sec. 203, p. *155. If, under such circumstances, the consignor wishes to prevent the title from vesting in the consignee, he must, by bill of lading, make the goods deliverable to his own order: 1 Benjamin on Sales, sec. 455, p. 348.

If, then, the title to the sugar passed to the consignees when delivered on board the vessel at Cora Plantation, nothing passed to the interpleader by the transfer of the bills of lading, even admitting that they were transferable by delivery, and vested in the transferee all of defendants' interest in the property. It is true this was matter of intention on the part of the vendors of the sugar with respect of which the bills of lading are prima facie

evidence only, and extraneous evidence was permissible for the purpose of showing the real intent of the parties. But as to these sugars, notwithstanding lots 5, 6, 7, 8, and 9, were sold subject to approval by the consignees before payment, when the facts that they were sold at four ⁴⁴⁶ and seven-eighths cents per pound, while other sugars sent by the same shipment were to be delivered on the levee in the city of St. Louis, at a less price, that they were weighed, marked with consignees' names, put on board the vessel in accordance with the contract, and the bills of lading made out to the consignees respectively, are taken in connection with all the other evidence in the case, it is almost conclusive that the title to these sugars vested in the consignees when shipped.

But it is insisted that the sales were for cash, and that the property remained in the vendors until paid for. In answer to this position, it is sufficient to say that payment was waived as a condition precedent to investing the title in the consignees when the goods were shipped to them without any intention, in so far as appears from the record, on the part of the consignors to retain title to them until they were paid for: Tiedeman on Sales, secs. 85, 207, and authorities cited.

In *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299, it is said: "If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And, on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property."

Again, in the same case, it is said: "A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have ⁴⁴⁷ acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him": See, also, *Hobart v. Littlefield*, 13 R. I. 341.

In passing upon the transferability of bills of lading by delivery in *Allen v. Williams*, 12 Pick. 297, Shaw, C. J., in delivering the opinion of the court, said: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property, and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs." That case was followed with approval in *First Nat. Bank v. Dearborn*, 115 Mass. 219; 15 Am. Rep. 92. In each of those cases, the consignor had simply taken the carrier's receipt for the goods, and it was held that the transfer of the receipts by delivery without indorsement was a symbolical delivery of the goods covered by the receipts, and transferred to the transferee all interest the consignors had in the goods at the time of the transfers of the receipts.

In *First Nat. Bank v. Crocker*, 111 Mass. 163, it was held that a bill of lading transferred by delivery passed to the transferee all the interest of the pledgor or consignor, in the goods covered by the bill. A similar ruling was made in *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Michigan Cent. R. R. Co. v. Phillips*, 60 Ill. 190; *Phelps v. Bank*, 2 La. App. (McGloin) 19.

If the title to these sugars vested in the purchasers when delivered on board of the vessel in pursuance of the contracts of purchase, then the fact that the bills ⁴⁴⁸ were retained by the vendors could not and did not affect the title to property which had already passed from them, and it matters not that both by the statutes of Louisiana and Missouri the carrier is forbidden to deliver goods to anyone but the person having the bill of lading. This is a question between purchasers of the goods and the carrier.

The right to examine the sugar by the consignee in the one instance and of approval in others before payment of the purchase price was not a condition in favor of the vendors, or of which they could avail themselves, but was a condition in favor of the purchasers only. The vendors had done all under the circumstances they could do, or that the law required to complete the sales on their part.

When goods are consigned, and the right of disposition is retained in the consignors by the bill of lading, then the delivery of the bill without indorsement for value transfers the property in the goods included in the bill. Such is the legal effect of a bill of lading for goods consigned to a factor for sale on account

of the consignor, as in such case there is no sale of the property before the transfer of the bill: *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145; 100 Am. Dec. 363; *Valle v. Cerre*, 36 Mo. 576; 88 Am. Dec. 161; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290; *Marine Bank v. Wright*, 48 N. Y. 1; *Allen v. Williams*, 12 Pick. 297; *Jordan v. Pennsylvania Co.*, 31 Alb. L. J. 250; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360; 18 Am. Rep. 299.

The same rule applies in case of sale, if the right to dispose of the property is retained in the consignor by the bill of lading: *Weyand v. Atchison etc. Ry. Co.*, 75 Iowa, 578; 9 Am. St. Rep. 504.

Under the contracts with respect to lots numbered 1, 3, 2, and 4, the first two lots were to be delivered on the levee in St. Louis, and the last two in ⁴⁴⁹ said city, no other place being named. Notwithstanding the bills of lading for these sugars were also made in favor of the respective consignees, the contracts not only show that they were to be delivered in St. Louis, but also show that they were sold at about one cent on the pound in advance of other sugars, shipped at the same time under contracts to be delivered on the vessel, which tended to show, aside from other facts and circumstances in evidence, that the consignors retained title thereto, and that they were shipped at their risk: If so, while in transit the carrier was their agent: 2 Benjamin on Sales, Kerr's ed., sec. 925; *Dunlop v. Lambert*, 6 Clark & F. 600. This, however, is a matter depending largely upon the intention of the consignors, and a question for the consideration of the court or jury. A bill of lading is understood to be a symbol of the property for which it is given, and, when in favor of the consignor, his agent or factor, is transferable by delivery without indorsement for value, and, when so transferred, carries with it the property in the goods which it covers: *Authorities supra*.

This is according to the law merchant which prevails in the state of Louisiana as in the state of Missouri: *Phelps v. Bank*, 2 La. App. (McGloin) 19. By it the bills of lading are the representatives of the property for which they were given, and their delivery to the interpleader a symbolical transfer to it of whatever title, if any, the consignors had in the sugars at the time, subject, however, to any legal or equitable defenses the consignees may have had as against the consignors.

And if a bill of lading in favor of the consignee, although such consignee be the agent or factor of the consignor, may be transferred by the consignor by delivery for a valuable consideration,

we can conceive of ⁴⁵⁰ no reason, in the absence of statutory inhibition, why such bill in favor of a consignee who is a purchaser, when retained by the consignor, may not be transferred in the same way. We can see no difference in principle. If extraneous evidence is admissible to show the real intent of the consignor as to the retention of the title of the goods covered by the bill in the one case, it must be in the other.

Section 2482 of the Louisiana code does not, as supposed, provide that the only means of the transfer of a bill of lading shall be by indorsement. The law merchant is part of the common law; by it bills of lading are transferable by delivery, and statutes in derogation thereof should be strictly construed: *Crowell v. Van Bibber*, 18 La. Ann. 637. Therefore, the statutes of the state which provide that indorsement and delivery of bills of lading shall pass title should not be so construed as to mean that such bills may not be transferred by delivery for a valuable consideration. Our conclusion is, that the bills of lading were transferable by delivery, subject to the conditions hereinbefore stated.

It is further contended by plaintiffs that the "interpleader is at best in the position of a creditor holding for its security two separate funds, on one of which only plaintiffs have a claim. And so, if the defendants had the right to ship, and had shipped, the goods to their own order, and had taken bills of lading accordingly, thus reserving to themselves the *jus disponendi*, and if they had drawn drafts against the bills of lading, and had discounted the drafts, with the bills attached, thus giving the interpleader a lien on the goods, still, when the interpleader received notice of the plaintiffs' claim on the goods, it held in its hands money of defendants which it had the right to apply to payment of the dishonored drafts, and it was bound so to apply it. The interpleader, under such circumstances, ⁴⁵¹ cannot touch the property on which the plaintiffs have a lien until it has exhausted the other fund on which plaintiffs have no lien"; that the bank did not obtain absolute title to the goods, and will hold if it gets the fund, in trust for Meyer & Co., and, as such trustee or bailee, the bank is subject to all equitable rules in its treatment of its trust and its relations to its beneficiary.

The rule in case one lienor has a lien on two different funds for a debt and another lienor has a lien on one of the funds only for a different debt is announced by Mr. Story in his work on *Equity Jurisprudence*, thirteenth edition, volume 1, section 633, as follows: "The general principle is, that if one party has a lien on, or interest in, two funds for a debt, and another party has a

lien on, or interest in, one only of the funds for another debt, the latter has a right, in equity, to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund."

But it does not seem as if plaintiffs are in position to invoke the aid of this equitable doctrine. The fact that they have attached the sugars and have obtained a judgment against the defendants by publication only, subjecting the sugars to their demand, certainly does not confer upon them any such right. Interpleader claims the sugars by reason of the transfers of the bills of lading, while plaintiffs claim them under attachment levied upon them as the property of defendants. If they were transferred by the bills of lading by defendants to interpleader, then they were not subject to attachment as the property of defendants, and interpleader must recover in this action; upon the ⁴⁵² other hand, if they were not thus transferred the result must be in favor of plaintiffs. There can be no such thing as a lien on the sugars under the circumstances in this case in favor of both the interpleader and plaintiffs. Moreover, plaintiffs are only general creditors, having no lien on the property save by attachment, and will hold the proceeds arising from the sale of the property except that portion, if any, interpleader can show it was the owner of at the time of its seizure under the attachment writ. It would, therefore, seem to logically follow that plaintiffs are in no position to ask that interpleader be first required to apply any amount in interpleader bank to the credit of defendants to the payment of their indebtedness to interpleader, before being permitted to recover in this action.

The declaration of law given on the part of interpleader is not in accord with the views herein expressed, and is, we think, erroneous.

The judgment is reversed and the cause remanded to be tried in accordance with this opinion.

Gantt, P. J., and Sherwood, J., concur.

SALES—DELIVERY TO CARRIER.—If goods are delivered to a common carrier for transportation to the purchaser without any conditions, such delivery passes the title although the purchase money is afterward collected by the vendor at the place from which the goods were ordered: *State v. Wingfield*, 115 Mo. 428; 37 Am. St. Rep. 406, and note. The legal presumption is, that upon the delivery of goods to a common carrier the title thereto vests in the consignee: *Dyer v. Great Northern Ry. Co.*, 51 Minn. 345; 38 Am. St. Rep. 506,

and note. See, also, the extended notes to *McNeal v. Braun*, 26 Am. St. Rep. 451, and *State v. Carl*, 51 Am. Rep. 570.

SALES FOR CASH—WAIVER OF CONDITION.—A sale for cash can be avoided by the vendor upon failure by the vendee to pay the purchase money while the property is in his hands or in the hands of any other purchaser, unless the payment of the purchase price has been waived: *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615, and note with the cases collected.

SALES.—EFFECT OF VENDOR RETAINING BILL OF LADING is discussed in the extended note to *McNeal v. Braun*, 26 Am. St. Rep. 452.

BRADLEY v. REPELL.

[133 MISSOURI, 545.]

A CORPORATION WHOSE EXISTENCE HAS EXPIRED BY THE TERMS OF THE LAW creating it is not a *de facto* corporation, and a conveyance purporting to be made by it is void.

CORPORATIONS, DISSOLUTION OF.—Upon the expiration of the term of the corporate existence as fixed by law or its charter, it becomes *ipso facto* dissolved, and can no longer act in a corporate capacity, and its title to property ceases.

THERE CANNOT BE A CORPORATION DE FACTO where there cannot be a corporation *de jure*, at least, as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its existence.

CORPORATION, DISSOLUTION, JUDICIAL DETERMINATION OF, WHEN NOT NECESSARY.—If the term of the corporate existence, as stated by a general law or in its charter, has expired, no judicial investigation or determination of that fact is required, and acts subsequently purporting to be done by it may be collaterally assailed on the ground that it did not exist.

PRACTICE, NEW TRIAL, REVIEW, OF ORDER GRANTING.—If it appears that a new trial was granted upon grounds stated by the court and which were insufficient to warrant its action, such action cannot be defended nor a reversal of the order granting the new trial avoided, on the ground that the court might have been warranted in its action by some other ground stated in the motion for a new trial, but upon which the court does not appear to have based its action.

Teasdale, Ingraham & Cowherd, for the appellant.

Hardwicke & Hardwicke, and Porterfield & Pence, for the respondents.

549 **BRACE, P. J.** This is an action in ejectment in common form to recover the possession of certain lands described in the petition situate in Kansas City, instituted in the circuit court of Jackson county, taken thence by change of venue and tried in the circuit court of Clay county. The answer was a general denial, and a plea of the statute of limitations as to a part of the

land, and no claim as to the remainder. Issue was joined by reply.

On the trial, at the close of the plaintiff's evidence, the court sustained a demurrer to the evidence as to the plaintiff T. C. Bradley, and overruled it as to the other plaintiffs, Samuel F. Freeman and the Atlas Investment Company. The trial then proceeded, and, after all the evidence was heard, the issue was submitted to the jury, who returned a verdict for the defendant. Thereupon plaintiffs filed motions for new trial and in arrest of judgment. The motion for new trial, coming on to be heard, was sustained and the verdict set aside on the following grounds, specified of record:

"9. Because the court erred in refusing to admit as evidence a certified copy of the warranty deed dated August 20, 1880, from the West Kansas City Land Company to Charles W. Whitehead, which certified copy was offered in evidence by plaintiff."

550 "16. Because the court erred in refusing to admit as evidence the certified copy of the quitclaim deed from the West Kansas City Land Company to Charles W. Whitehead, which is offered in evidence by the plaintiff."

From the order sustaining this motion and setting aside the verdict, the defendant appeals.

1. By a special act of the legislature approved March 14, 1859 (Sess. Acts, 1858-59, p. 292), the West Kansas City Land Company was incorporated, with power "to make contracts, sue, and be sued," and to "purchase and hold any quantity of land in Kaw township, in Jackson county, Missouri, not exceeding one thousand acres; to lay the same off into parks, squares, and lots; improve, sell, or convey the same by deed; to repurchase and reconvey any portion of the same, when necessary in transacting the legitimate business of said company; and purchase and hold any personal property necessary for the purposes above indicated." Nothing was said in the act, either directly or indirectly, as to the duration of the company's corporate existence.

By the general law in force at the time this company was thus incorporated, it was provided that "every corporation, as such, has power: 1. To have succession by its corporate name, for the period limited in its charter, and when no period is limited, for twenty years": 1 Rev. Stats. 1855, sec. 1, p. 369. And that "upon the dissolution of any corporation, . . . the president and directors, or managers of the affairs of said corporation, at the time of its dissolution, . . . shall be trustees of such corporation,

with full power to settle the affairs, etc": 1 Rev. Stats. 1855, c. 34, sec. 24, p. 375.

The corporation thus chartered was an ordinary business corporation, whose corporate existence, by ⁵⁵¹ virtue of these statutory provisions, expired on the 14th of March, 1879, and the two deeds rejected by the court upon the trial were executed after that date in the name and under the corporate seal of the company "by William McCoy, President," "Attest, Edw. A. Allen, Secretary."

The defendant objected to the introduction of these deeds offered in evidence by the plaintiffs as constituting a part of their chain of title, and, in support of his objections, read in evidence the act of the legislature aforesaid incorporating said company, and it was admitted that said company, in whose behalf said deeds had been so executed, was the same company by said act incorporated, and that it was never thereafter reincorporated.

The defendant's claim of title was by adverse possession, and there is not in the case any question of estoppel to deny the existence of the corporation by reason of the relation sustained by the defendant to the land company or of any dealings by him directly or indirectly with it, or any person connected with or representing it. Why, then, should the defendant be precluded from showing, by the law that gave that company its corporate existence, that at the time these deeds were made it was dead, incapable of executing a legal conveyance of the real estate in question, and that said deeds were therefore void, and no evidence of title?

The answer returned by the counsel for plaintiffs to this question is, "that it is the settled law of this state that a conveyance to or by a corporation de facto can be assailed on the grounds of lack of corporate existence only by the state."

This answer does not meet the question unless it be assumed that a corporation, whose corporate existence has expired by the terms of the law which created ⁵⁵² it, still exists as a de facto corporation as to all persons except the state, an assumption that we think is not sustained by the authorities cited, and is not "the settled law in this state."

On the contrary, in this state, as elsewhere, unless otherwise provided by statute, the law is, that where the term of the existence of a corporation is fixed by its charter or the general law, upon the expiration of that term the corporation becomes ipso facto dissolved; it can no longer act in a corporate capacity, and

its title to property ceases: 2 Beach on Private Corporations, sec. 780; 2 Morawetz on Private Corporations, sec. 1031. In such an event in this state the title to its property is, by statute, devolved upon trustees for the settlement of its affairs and the distribution of its assets: Rev. Stats. 1855, c. 34, sec. 24, p. 375; Rev. Stats. 1889, sec. 2513. And thereafter it has no power to make a legal contract or convey property in its corporate name and capacity; it ceases to be a corporation *de jure et de facto*, for the reason that there is no law in force authorizing its existence, and no law by virtue of which it might exist, and no person, unless estopped by his own action, ought to be, or can be, precluded from showing this fact, apparent on the face of the law itself, without the necessity of any judicial investigation, in an issue involving his own personal rights and interests.

An examination of the authorities cited by counsel for respondents, and of all the other cases touching this question, will show that it has never been otherwise ruled in this state, nor elsewhere so far as we have been able to discover.

The first case cited by counsel for respondent, *McIndoe v. St. Louis*, 10 Mo. 576, does not touch the question, side, edge, or bottom. The cases of *Chambers v. St. Louis*, 29 Mo. 543; *Land v. Coffman*, 50 Mo. 243; *Shewalter v. Pirner*, 55 Mo. 218; and *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656, go no farther in the direction of our present inquiry than to hold that where an existing corporation has power to acquire, hold, and dispose of land, the question whether such corporation has transcended the limits of such power in respect thereto can only be raised and determined in a direct proceeding by the state against the corporation. But this falls far short of the question here, which goes to the fact of the existence of the corporation, conceded in these cases.

It is also well-settled law that one who has contracted with an organization as a corporation in its corporate name is estopped from denying the existence of such corporation at the time of making the contract or of alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract: 4 Thompson on Corporations, sec. 5275; 4 Am. & Eng. Ency. of Law, 198, and cases cited, note 1, 199; 2 Morawetz on Private Corporations, secs. 750, 753; 1 Beach on Private Corporations, sec. 13.

And so it has been ruled in this state in many cases, including those next cited in the brief of counsel for respondent: *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128; *Farmers'*

etc. *Ins. Co. v. Needles*, 52 Mo. 18; *St. Louis v. Shields*, 62 Mo. 247; *Stoutimore v. Clark*, 70 Mo. 471; *Studebaker v. Montgomery*, 74 Mo. 101; *St. Louis Gaslight Co. v. St. Louis*, 84 Mo. 202; affirming 11 Mo. App. 55; *Broadwell v. Merritt*, 87 Mo. 95; *Granby Min. Co. v. Richards*, 95 Mo. 106.

Of course, such estoppel extends as well to the privies of, as to the parties to, such contracts: *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Ragan v. McElroy*, 98 Mo. 349; *Broadwell v. Merritt*, 87 Mo. 95; *Reinhard v. Virginia etc. Min. Co.*, 107 Mo. 616; 28 Am. St. Rep. 441.

The ruling in none of these cases, however, supports the contention that the deeds should have been ⁵⁵⁴ admitted in evidence in the case in hand, in which, as has been already seen, there is no question of estoppel.

Nor do the cases of *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383, or *Crenshaw v. Ullman*, 113 Mo. 633, cited by plaintiff's counsel, in which it was ruled (where there was a law authorizing the existence of the corporation at the time when the organization assumed to act, and did act, as such corporation) that its corporate existence as to such act could not be called in question in a collateral proceeding, sustains respondent's contention.

It is true in these and other cases it is sometimes broadly stated as settled law, in substance, "that a transfer of property to or by a corporation de facto will be binding and valid as against all parties except the state," but this is simply a restatement in another form of the proposition ruled. It implies that the case is one in which a corporation may by law exist, for there can be no corporation de facto when there cannot be a corporation de jure (1 *Beach on Private Corporations*, sec. 13; 4 *Thompson on Corporations*, sec. 5275; 1 *Thompson on Corporations*, sec. 523), at least as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its existence. Whatever may be the rule as to these, as to all other persons there must be at least color of law for its corporate existence to preclude such inquiry, and it would seem to go without saying that a law which gives existence to a corporation for a certain number of years, at the end of which time it must surely die, cannot give color to its corporate existence after the date of its death as decreed by the terms of that same law.

Judge Thompson, in his recent work on *Private Corporations*, says: "There is much judicial authority for the proposition that where a corporation is brought to an end by lapse of time, that

is, by the expiration of the distinct limitation of its life in its charter, any ⁵⁵⁵ further exercise of its corporate powers may be questioned collaterally. The governing principle here is, that upon the expiration of the term limited by the charter for the existence of the corporation its dissolution is complete. "The dissolution in such a case," it has been said, "is declared by the act of the legislature itself. The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead": Thompson on Corporations, sec. 530, citing in support of the text, *People v. Manhattan Co.*, 9 Wend. 351; *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285; *Wilson v. Tesson*, 12 Ind. 285; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400; 24 Am. Rep. 585; *Dobson v. Simonton*, 86 N. C. 492; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Bank of United States v. McLaughlin*, 2 Cranch C. C. 20.

Further on in the same section, however, he says: "On the other hand, it has been ruled in Missouri that the question whether the charter of a corporation has expired by limitation of time can be adjudicated only in a direct proceeding by the state—that such a defense cannot be set up collaterally in an action by the corporation": Citing the single case of *St. Louis Gaslight Co. v. St. Louis*, 84 Mo. 202; affirming 11 Mo. App. 55.

In *Sturges v. Vanderbilt*, 73 N. Y. 384, decided in 1878, *Rapallo, J.*, said: "It is further claimed that, until a corporation is declared dissolved by judicial decree, creditors may proceed against it by its corporate name, and that it remains in *esse* until formally adjudged dissolved. All the cases cited in support of this proposition relate to a dissolution in consequence of insolvency or nonuser or misuser of the corporate franchises, or some other cause of forfeiture. In such cases, it is well settled that the dissolution does not take effect until judicially declared. But the principle upon which that class of cases rests is not applicable to a dissolution ⁵⁵⁶ by expiration of the charter. The dissolution in such a case is declared by the act of the legislature itself. The limited time of existence has expired and no judicial determination of that fact is requisite. The corporation is *de facto* dead: *People v. Walker*, 17 N. Y. 503; *Greeley v. Smith*, 3 Story, 658. Where the charter of a corporation is annulled by act of the legislature, the corporation is extinct and no judgment can be rendered against it: *Mumma v. Potomac Co.*, 8 Pet. 286; *Merrill v. Suffolk Bank*, 31 Me. 57; 50 Am. Dec. 649. We have been referred to no authority holding a contrary doctrine."

After a very extended search for, and a careful examination

of, the cases both before and since the date of this decision, we also have been unable to find any authority contrary to this doctrine; unless it can be found in *St. Louis Gaslight Co. v. St. Louis*, 84 Mo. 202, above cited by Judge Thompson, or in *Miller v. Coal Co.*, 31 W. Va. 836; 13 Am. St. Rep. 903, also cited by him, and to these cases our attention will now be directed.

In *St. Louis Gaslight Co. v. St. Louis*, 84 Mo. 202, which was an action by a corporation upon a written contract entered into between plaintiff and defendant, the defendant claimed that the plaintiff could not maintain its action thereon, because its corporate life had expired before the making of the contract and the institution of the suit. Upon this claim, the court ruled that the defendant, having, by entering into the contract with the plaintiff, admitted the capacity of the plaintiff to enter into a binding obligation as a corporation, was estopped to deny plaintiff's corporate existence, when sued upon a promise contained in such contract. After having by this ruling fully covered the point in issue, Judge Thompson, who delivered the opinion of the court, in the same connection closed this paragraph of his opinion by adding the following dicta: "Whether ⁵⁵⁷ or not its charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding such as this. It can only be raised in a direct proceeding between the state of Missouri and the defendant: *St. Louis v. Shields*, 62 Mo. 247, 251."

The case cited by the learned judge was one in which it was sought to draw in question the constitutionality of an act incorporating the plaintiff, in which the court held that the act was constitutional, and, further, that the defendant, having entered into the contract with the city, admitted its corporate capacity and was estopped from denying it in an action upon such contract. While the latter ruling supports the ruling in the case in which it is cited by Judge Thompson, and is in harmony with all the cases, it does not support his dicta therein, that the question whether the charter of the corporation has expired by limitation "can only be raised in a direct proceeding between the state of Missouri and the defendant." The dicta being, then, obiter to the case then in hand, and unsupported by the case cited for it, is not to be regarded as authority.

In the case of *Miller v. Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, it was held, under the statute of that state, providing, in effect, that when a corporation shall expire or be dissolved suits may be brought, continued, or defended, property conveyed, and all lawful acts be done in the corporate name in the like man-

ner and with like effect as before such dissolution or expiration, so far as is necessary to wind up its affairs, that a corporation continuing in business, and committing a tort after the expiration of the term of its existence as provided by its charter, was precluded from setting up the expiration of its corporate existence as so provided in an action against it by the person injured by such tort. Here we have a law by which the corporation might ⁵⁵⁸ exist for certain purposes after its charter term had expired, and a state of facts which precluded the corporation from denying its existence; in other words, law for the existence of the corporation, and an estoppel to deny it. These two elements are alike wanting in the proposition of the dicta, and in the facts of the case under consideration, and this West Virginia case no more than the case of *St. Louis Gaslight Co. v. St. Louis*, 11 Mo. App. 55 (the ruling in which, but not the dicta, was approved in 84 Mo. 202), is authority for his proposition or the respondent's contention in the case in hand.

We are cited by counsel for respondent to one other case, which has not yet been noticed, the case of *Catholic Church v. Tobbein*, 82 Mo. 418, in which it was held that the plaintiff, suing as a corporation, acquired no right to property devised to an unincorporated organization of the same name, by a will which took effect before the plaintiff was incorporated.

It cannot be seen how this case can in any way support the respondent's contention. On the contrary, the ruling could have been made only upon an inquiry and finding that the alleged corporation was nonexistent at the time the will took effect. It was nonexistent then because there was no law authorizing its existence.

If inquiry could be legitimately made in that case whether there was any law in force authorizing the existence of that corporation, why cannot a like inquiry be made in the present case?

The defendant was not precluded from making such inquiry by any act of his own, or of any other person under whom he claimed. He did not propose to bring in question the validity of any law, authorizing the existence of the corporation at the time these deeds were made, or the regularity or validity of the ⁵⁵⁹ corporation organized under such law, or the validity of any of the acts of such corporation to determine which would require judicial investigation, but simply to show by the law which once had given corporate existence to the West Kansas City Land Company that at the time these deeds purport to have been exe-

cuted that corporation had ceased to exist, and could not have executed them. Upon no principle of law with which we are familiar can he be precluded from so doing, and we think no well-considered case can be found that, properly understood, gives support to a ruling to that effect.

We have been speaking of the law of the company's existence as a unit, for we fail to discover how the fact that the limit of the term of existence being contained in the general law, and not in the special act, can in any way affect the principle we have been discussing. The general law became a part of the charter of the company at the moment of its creation and must be read into it the same as if it had been written therein.

It follows from what has been said that the trial court committed no error in rejecting the deeds aforesaid when offered in evidence by the plaintiffs, and that it did commit error in setting aside the verdict for defendant and granting a new trial on the ground that it did commit error in refusing to admit said deeds in evidence.

2. It is contended, however, that the action of the court in this behalf ought not to be reversed, for the reason that the court may have been warranted in setting aside the verdict and granting a new trial upon some of the grounds stated in the motion other than the two upon which it based its action, and which alone are brought here for review by defendant.

560 The law requiring that in every order granting a new trial the grounds upon which the new trial is granted shall be specified of record, and the trial court having specified only these two, it must be presumed that no other ground was found in the motion for sustaining the application for a new trial. The effect of its action in sustaining the motion on the grounds specified of record was to overrule the motion as to the other grounds therein set out.

The court may have erred in overruling the motion as to some of these other grounds; but the presumption is, that the court acted correctly in so ruling, and the burden of showing that it committed error devolved upon the respondents against whom such adversary ruling was made, and, if they would have this court review that action, they must point out some other ground in the motion upon which it ought to have been sustained. In order to do so, it was necessary that the motion for a new trial containing such ground and the action of the court upon which it was based should have been made a part of the bill of exceptions, and thus appear in the record for review. The only ab-

abstract of the record that we have in this case is that of the appellant, in which no other grounds appear than the two specified of record. No counter abstract has been filed by the respondents, as provided by law (Rev. Stats. 1889, sec. 2253), calling in question the correctness of appellant's abstract; so that the bill of exceptions and the record proper as therein set out present the only matters before us for consideration.

We can review cases only upon the record made by the trial court, authenticated to us in the manner provided by law, and, having thus reviewed this case and found that the trial court committed error in setting aside the verdict and granting a new trial for the reasons specified of record, and no other ground for ⁵⁶¹ such action appearing upon the record thereof before us, the same is reversed and set aside, and the cause will be remanded to the circuit court with directions to enter up judgment in accordance with the verdict.

All concur.

Per Curiam. The foregoing opinion handed down in Division No. One is adopted as the opinion of the court in bank, Gantt, Sherwood, Macfarlane, and Burgess, JJ., concurring with Brace, C. J., therein; Barclay and Robinson, JJ., dissenting. Judgment will therefore be entered as directed in the opinion.

CORPORATIONS—EXPIRATION OF CORPORATE PRIVILEGE.—In an action to recover tolls by a corporation chartered to erect a bridge and to take tolls thereon for twenty years, it was held that although the forfeiture of a corporate franchise could only be taken advantage of by the state, the defendant might show that the twenty years had expired and thereby defeat the action: *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400; 24 Am. Rep. 585; but in *Miller v. Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, it was held that a private corporation, duly organized under the laws of West Virginia, which continues its business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation de facto for a tort committed by it after its charter has expired.

CORPORATIONS.—If there cannot lawfully be a corporation de jure there cannot be one de facto: *Georgia R. R. Co. v. Mercantile Trust etc. Co.*, 94 Ga. 306; 47 Am. St. Rep. 153.

CORPORATIONS—DISSOLUTION—NECESSITY FOR JUDICIAL DETERMINATION.—Even where a charter or statute expressly provides that in a certain event the corporation shall be dissolved, the charter is not ipso facto forfeited or the corporation dissolved, but there must be a judgment to that effect in direct proceedings instituted for that purpose, and until that time the company remains in existence: *Extended note to State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 195. See further the extended note to *Atchison Street Ry. Co. v. Nave*, 5 Am. St. Rep. 803.

ST. LOUIS v. VON PHUL.

[133 MISSOURI, 561.]

A CONTRACT BETWEEN TWO PARTIES MAY BE ENFORCED BY A THIRD when entered into for his benefit, though he is not named therein and was not privy to the consideration. It is sufficient that the promisee owes to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim.

MUNICIPAL CORPORATIONS, STREETS, BOND IN FAVOR OF PERSONS DOING WORK UNDER CONTRACTORS.—If a bond is executed by persons to whom work upon a public street has been awarded, stipulating that as soon as the work shall be completed they will pay to the proper parties all amounts due for material and labor, and that the bond may be sued upon at the instance of any materialman, laboring man, or mechanic in the name of the city, every person performing labor or furnishing materials upon the work is entitled to the benefits intended to be afforded him by such bond.

MUNICIPAL CORPORATION, POWER OF TO TAKE BOND FOR PROTECTION OF PERSONS WORKING ON ITS STREETS.—A municipality authorized to make improvements upon its public streets and to exact of the contractor his bond for the faithful performance of his contract has power to require such bond to contain a condition that the contractor will pay all persons performing labor or furnishing materials at his request and for the purpose of assisting him in the completion of his contract.

G. W. Lubke and W. B. Homer, for the appellant.

Willis H. Clark and Wood & Tansey, for the respondents.

563 MACFARLANE, J. Defendants Von Phul and Joseph Grimm secured a contract from the city of St. Louis to repair the sidewalks in a certain district. The contract provided in detail for the work, the materials to be used, and for the payment therefor by special tax bills to be charged against adjacent property. At the end of, and as a part of, the contract was this obligation, **564** signed by the contractors and the Municipal Trust Company and Edward Butler as securities:

“The said St. Louis Sidewalk Company, Stephen Von Phul and Joseph V. Grimm, proprietors, as principal, and Municipal Trust Company and Ed. Butler as sureties, hereby bind themselves and their respective heirs, executors, and administrators, unto the said city of St. Louis, in the penal sum of ten thousand dollars, lawful money of the United States, conditioned that in the event the said St. Louis Sidewalk Company shall faithfully and properly perform the foregoing contract according to all the terms thereof, and shall, as soon as the work contemplated by said contract is completed, pay to the proper parties all amounts due for material and labor used and employed in the performance

thereof, then this obligation to be void, otherwise of full force and effect, and the same may be sued on at the instance of any materialman, laboring man, or mechanic, in the name of the city of St. Louis, to the use of such materialman, laboring man, or mechanic, for any breach of the condition hereof; provided that no such suit shall be instituted after the expiration of ninety days from the completion of the above contract."

The Glencoe Lime and Cement Company furnished the contractors materials for use in performing their contract. The suit is upon the contract, wherein plaintiff claims a balance due on account of materials furnished amounting to nine thousand one hundred and fifty-three dollars and thirty cents.

On the trial, plaintiff offered in evidence an ordinance of the city providing for constructing and repairing sidewalks. The defendants, the Municipal Trust Company and Edward Butler, objected to the introduction of any testimony in the case as against them, for the reason that the petition failed to state or to show facts sufficient to constitute any cause of action in favor of either the ⁵⁶⁵ city of St. Louis or the Glencoe Lime and Cement Company against the said defendants or either of them, and that, under the allegations made in the petition, neither the city of St. Louis nor the Glencoe Lime and Cement Company have any right of action upon the instrument sued upon against the said defendants or either of them. The objection was sustained, and judgment was rendered in favor of said defendants and plaintiff appealed.

1. That a contract between two parties upon a valid consideration may be enforced by a third party, when entered into for his benefit, is well-settled law in this state. This is so though such third party be not named in the contract, and though he was not privy to the consideration: *Rogers v. Gosnell*, 58 Mo. 590; *State v. Laclede Gaslight Co.*, 102 Mo. 482; 22 Am. St. Rep. 789; *Ellis v. Harrison*, 104 Mo. 276, and cases cited. It is sufficient, in order to create the necessary privity, that the promisee owe to the party to be benefited some obligation of duty, legal or equitable, which would give him a just claim.

2. It is the policy of the law in this state to give security and protection to those who expend labor or supply material in making improvements for the benefit of private persons. This is done by securing to them by express law a lien upon the improvements upon which the labor was done, and in which the materials were used. The right to such security does not depend upon the character of the contract between the owner and contractor under which the improvements were made.

That these lien laws are founded upon principles of equity and right cannot be questioned. The principle is, that the labor expended and the material employed create the improvements, and the one benefited ⁵⁶⁶ thereby should see that compensation therefor is made.

Through considerations of public policy, the law has made no provision, by lien, or otherwise, for the protection of the laborer and materialmen for labor employed or material used in improving the public streets. But it cannot be denied that the same equity exists, and that the same moral obligation rests upon the city to protect those who improve its streets as rest upon those making private improvements. "Individuals clothed with public functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity": *Knapp v. Swaney*, 56 Mich. 350; 56 Am. Rep. 397.

There can, we think, be no doubt that the duty the city of St. Louis owed to anyone who should labor upon, or furnish material for, the improvements contemplated by the contract would create such a privity between them as would entitle the latter to the benefits intended to be afforded them under the express conditions of the bond.

3. But it is said that the bond, in so far as it undertakes, as a condition, to require the contractor "to pay to the proper parties all amounts due for material and labor used and employed in the performance" of the contract, is void, for the reason that the city had no power to exact it.

It must be, and is, conceded that "a municipal corporation has no general authority to exchange promises with other corporations or persons; its contracts, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes": *Thomas v. Port Huron*, 27 Mich. 323.

But municipal corporations have, not only the rights and powers expressly granted them, but also such implied powers as are necessary to carry into full ⁵⁶⁷ effect those expressly granted. "Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, or a right to defend": *Vincent v. Nantucket*, 12 Cush. 105.

The charter grants to the city of St. Louis not only the power to improve its streets, and keep them in repair, but requires all such improvements to be let out by contract to the lowest bidder, and further requires a bond to be given by the contractor with at least two sufficient sureties. These powers and duties are ex-

press. Can it be doubted that under these express powers would be also implied the authority to provide by contract every detail of the duty of the contractor? The power to make improvements and to let contracts therefor and to exact of the contractor a bond for the faithful performance of his contract necessarily implies the power to do everything necessary for the faithful performance of the work, for the protection of the city and its citizens, and for securing the best and lowest possible bids. Indeed, we are unable to conceive of any matter of detail incident to the contract and the work that the city might not require that a private person could require.

The charter requires a bond from the contractors to be taken. The conditions of the bond are not specified, except that it shall be for the faithful performance of the contract. The form and conditions are therefore left to the practical wisdom and business experience of the municipal authorities to whom it is intrusted. The same may be said in reference to the terms of the contract.

The question, then, is this: Is the requirement of the contract and the condition of the bond, that laborers and materialmen shall be paid, a proper and reasonable incident to the express power to improve ⁵⁶⁸ the streets by contract and to require a bond of the contractor? We think it is, even aside from any moral obligation the city was under to protect the laborers and materialmen.

Such a requirement gives credit to the contractor and enables him to secure labor and purchase material more readily and on better terms than could be done without the credit. Thus, the contractor can secure better labor and cheaper materials and is enabled to take the contract on lower terms than he could otherwise safely do. It also enables one with small means and limited credit to compete with those more advantageously circumstanced. The city is thus enabled to secure greater competition in bidding and to obtain better execution of the work on lower terms. It was not only to the interest of the city, but its plain business duty to secure those advantages.

We therefore think the city had the implied power to require the condition in the bond upon which plaintiff seeks to recover.

We are unable to draw a substantial distinction between the power exercised by the city in making this provision for laborers and materialmen, and that exercised in requiring the contractor to pay all such creditors as a condition to receiving his compensation from the city for the improvement. It is a question of power in each case.

The power to protect such creditors by the means last mentioned has never been questioned in this state so far as we have been advised. It was expressly recognized in *St. Louis v. O'Neil Lumber Co.*, 114 Mo. 82, in which Judge Thompson of the court of appeals, whose opinion was approved, said: "It is true that such persons are not, under the law as judicially construed, entitled to a mechanic's lien against any property belonging to the city; but that does not seem to afford a good ⁵⁶⁹ reason why no effect whatever should be given to this clause of the contract." The clause referred to was one requiring the city to withhold enough of the contract price to meet the claims of any laborer or materialman to whom the contractor might be indebted.

The same power was recognized in the board of public schools in *Luthy v. Woods*, 6 Mo. App. 68, and in the city of St. Louis in case of *St. Louis v. Keane*, 27 Mo. App. 644.

In the case of *Knapp v. Swaney*, 56 Mich. 349, 56 Am. Rep. 397, in discussing a like provision in a contract of the county for the construction of a courthouse, after conceding the proposition that corporations and quasi corporations possess only the power expressly granted them, and such as are implied in order to effectuate the purpose of those given, Judge Cooley says:

"But when this case is properly considered it does not appear to be a case in which the municipality has in any particular stepped aside from its proper functions or stepped over its proper bounds; it has simply made a contract for the construction of a necessary public building, and agreed upon the method and the conditions of payment. It has gone no further, and so far it had indisputably a right to go.

"But it is said that among the conditions is one which the corporate board had no right to impose, because it did not concern the public, but was a matter exclusively between the contractors and those who should deal with them. It is for this reason that the condition is assumed to be *ultra vires*. And had the condition been made the subject of independent contract, instead of being incorporated in a contract for a proper public work, the objection to it would have been insurmountable. Whether it was invalid here is a very different question.

⁵⁷⁰ "The purpose of the stipulation is very manifest. It is, that a contract the county has made shall not be the means of mischief to those who, though not contractors with the county, may perform labor or furnish materials in reliance upon the moneys to be paid under it. It would seem that to prevent such mischief was a proper object to be had in view by any public board when

entering into a public contract. It would seem that there was a moral obligation in the case which the board might well recognize, even though not compellable to do so. And individuals clothed with public functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity.

"A corporation, when constructing a public building or other public work, is chargeable with moral duty, as an individual would be, to see that it is so constructed that people may not be injured in coming near to, or making use of, it in a proper manner. In some cases they may not be legally responsible for failure to perform this duty; but where the moral obligation exists, it cannot be said that any provision for its performance, not improper in itself, is ultra vires. A county may go to great pains and great expense to make its courthouse unquestionably safe, that individual citizens may not suffer injuries consequent upon its construction. But if it may do this, it would be very strange if it were found lacking in authority to stipulate, in the contract for the building, that the contractors, when calling for payment, shall show that they are performing their obligations to those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people. We cannot think such is the case."

We quote at length from this sensible and eminently just and equitable treatment of such contracts. ⁵⁷¹ The reasoning is equally applicable to the contract here in question. See, also, to same effect, *Merchants' etc. Nat. Bank v. Winant*, 123 N. Y. 267; *Merchants' etc. Nat. Bank v. Mayor etc.*, 97 N. Y. 355.

The following cases uphold the right of third persons, such as subcontractors, laborers, and materialmen to maintain an action on a bond, given by a contractor to a state, county, city, or school district, conditioned for the faithful performance of a contract for a public improvement, and for the payment of all claims of such third persons, though no express power was given the obligee to require such conditions: *Baker v. Bryan*, 64 Iowa, 562; *Lyman v. Lincoln*, 38 Neb. 800; *Sample v. Hale*, 34 Neb. 221; *Korsmeyer etc. Co. v. McClay*, 43 Neb. 649; *Kaufmann v. Cooper*, 46 Neb. 644.

In the case first cited, which was a suit on a bond given in a school district, it is said by Beck, J.: "The authority to contract is general, and broad enough to cover all covenants which the directors, in their wisdom, may deem necessary or proper, in order

to secure the erection of the house and the protection of the interests of the district—the objects for which the contract was made. If the directors of the district, in the exercise of their discretion, concluded that the work would be prosecuted with more rapidity, or would be better done by securing subcontractors, they surely would be authorized to provide therefor.”

In *Lyman v. Lincoln*, 38 Neb. 800, the bond was given to the city of Lincoln to insure the erection of public buildings. The contract required of the contractor the payment “of claims of all parties furnishing materials or labor” in the construction of the buildings. The bond was upon the condition that the contractor should “well and truly execute all and singular the foregoing stipulations.” The court held that one furnishing materials, which were used in the construction of the ⁵⁷² buildings, could maintain an action therefor upon the bond. In its opinion the court says: “Obviously, the city of Lincoln intended by this bond to protect from defaults of its contractors all those who might labor on or furnish materials for its buildings. The petition assailed sets out no statute or ordinance authorizing the city of Lincoln to do this, but we do not deem such a statute or ordinance indispensable. The awarding of the contract to Lane & Sweet was a sufficient consideration to them and their sureties to support their promise to pay for this labor and material. The promise they made to the city of Lincoln was for the benefit of all who labored on these buildings and all who furnished material that was used in their construction; and since Lyman had furnished material to these contractors which was used in these buildings for the city, the bond inured to his benefit and he can maintain a suit thereon.”

Several cases have been cited by defendants in support of their position that the action will not lie for want of authority in the city of St. Louis to require such conditions.

It has been held in this state, and in some others, that a private citizen, whose property was consumed by fire, was not entitled to the benefit of a clause in a contract between the city and a water company, whereby the latter obligated itself to furnish a supply of water sufficient to extinguish all fires, and to be responsible for all damages resulting from a failure to do so: *Howsmon v. Trenton Water Co.*, 119 Mo. 305; 41 Am. St. Rep. 654, and cases cited.

Those cases are distinguishable from this one in the fact that the contracting cities were under no legal or moral obligation

to its citizens to extinguish fires, and there was, therefore, not such privity between the ⁵⁷³ city, as promisee, and the citizen, as would give the latter a right of action on the contract.

It may also be said, as another distinguishing feature, that the general power granted a city to provide for the prevention and extinguishment of fires carried with it no implied power to make contracts for indemnifying citizens for losses by fire. Such contracts are neither beneficial to the city nor incident to the power conferred. They are merely independent contracts, which the cities have no more power to make than they have to make contracts with an insurance company for insuring the property of all citizens against loss by fire.

The case of *Kansas v. O'Connell*, 99 Mo. 359, is also cited and relied upon as an authority against the power of the city to make the contract. But it will be observed that the clause of the contract relied upon by plaintiff in that case was held not to have been intended as an agreement for the benefit of third persons, but for the protection and benefit of the city. That it was simply a contract of indemnity to the city. The court expressly declined to express an opinion on the question of the power of the city to enter into a contract for the benefit of third parties. It is said: "Whether the city could require the contractor to give a bond which would be available to third persons in case of injuries received by them on account of the negligence of the contractor is a question which need not be considered."

The case of *New Haven v. New Haven etc. R. R. Co.*, 62 Conn. 253, is also cited by defendants as an authority sustaining their position. But it will be observed that the contract relied upon in that case was made solely for the benefit of third persons. The railroad company agreed with the city to pay all damages property owners should sustain on account of a contemplated ⁵⁷⁴ change of its track. The contract had no other object. In a suit on this contract by the city for the use of property owners, the court held that the city had no power to engage in the collecting business, or to act as trustee for its citizens at its own expense. That contract had for its chief object the benefit of third persons, while in the case in hand the contract is for the benefit of the city, and the protection given third persons was fairly incidental to it.

The case of *Kansas City etc. Co. v. Thompson*, 120 Mo. 221, in its facts, is not fairly distinguishable from this one, and is an authority directly sustaining the position of defendants. But, after a careful reconsideration of the question decided, we are

all of the opinion that the principles announced in that case cannot be sustained either on reason or authority, and it should be, and with the concurrence of all the judges of Division Two is, overruled.

The judgment of the circuit court is reversed and the cause is remanded.

All the judges concur.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS—WHO MAY SUE ON.—A person for whose benefit an express promise is made in a valid contract between others may maintain an action thereon in his own name. The contract must have been made for his benefit as its object, and he must be intended to be benefited thereby: *Howsmon v. Trenton Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654, and note. This subject is fully treated in the extended note to *Linneman v. Moross*, 39 Am. St. Rep. 531-535.

THOUGH A CONTRACT WITH A CITY for the doing of work upon its streets contains a provision that the contractor will pay all sums of money due from him for materials furnished or work done by others in connection with his contract, he is not answerable to persons who did work or furnished materials for one to whom he had sublet work: *Brower Lumber Co. v. Miller*, 28 Or. 565; 52 Am. St. Rep. 807.

TEASDALE v. STOLLER.

[133 MISSOURI, 645.]

JUDGMENTS, REVERSAL, RECOVERY OF MONEYS PAID TO SATISFY.—If money is voluntarily paid in satisfaction of a judgment which is subsequently reversed, it cannot be recovered if the person to whom it was paid is in equity and good conscience entitled to it. So held where the reversal of the judgment was due to a mistake in the procedure.

APPELLATE PROCEDURE.—An error in an instruction is not a ground for reversal if it was in favor of the party complaining of it.

Johnson & Lucas, for the appellant.

Gage, Ladd & Small, for the respondents.

648 *BRACE, P. J.* On the 1st of August, 1878, the defendants deposited in the Mastin Bank, of Kansas City, three thousand seven hundred and fifty-seven dollars and fifty-six cents to be transmitted to the Exchange Bank of Denver, Colorado, and placed to the credit there of one F. P. Earnest.

On the 3d of August, 1878, the Mastin Bank failed, without having made such transfer, and made a general statutory assignment, for the benefit of its **649** creditors, to Kersey Coates, who accepted the trust. On the 29th of January, 1879, the demand of defendants, based upon such deposit, was presented to the as-

signee and allowed on the general class of demands against the assets assigned, and they received a dividend of twelve per cent thereon.

Afterward, on the 25th of March, 1880, the defendants instituted against said assignee a suit in equity in the Jackson circuit court to impress upon the assigned assets a trust in their favor for the balance of said demand amounting to the sum of three thousand three hundred and six dollars and sixty-six cents, which resulted in a judgment and decree in their favor on the 7th of January, 1882. An appeal was granted the assignee from this judgment to the supreme court, but no bond was given; and afterward, on the twenty-third day of February, 1882, the assignee paid the amount of the face of said judgment to the defendants and took from them a receipt in full therefor, the defendants agreeing to knock off the interest and some costs, amounting in the aggregate to some twenty-odd dollars, and, at the April term, 1882, of the Jackson circuit court, the assignee, in his term report, reported that the judgment in favor of defendants had been paid, showing the amount thereof, and that their general demand had been canceled, which report was approved by the court.

Afterward, in pursuance of an order of said court, the undisposed of assets of the bank in the hands of the assignee were sold, and John J. Mastin, through his attorney, became the purchaser thereof, and the sale was approved by said court on the 26th of April, 1884.

In the mean time, the appeal aforesaid, having in due course reached this court, and coming on for hearing, was prosecuted by Mastin's attorneys and resulted, at the October term, 1885, of this court, in a reversal ⁶⁵⁰ of the judgment aforesaid of the Jackson circuit court in favor of the defendants against the assignee (*Stoller v. Coates*, 88 Mo. 514), the court ruling, however, in favor of the defendants on the merits, by holding the assets of the bank chargeable with the amount claimed as a preferred demand by reason of the trust, but that defendants had waived their special and preferential right by having their demand allowed as a debt against the general assets, and on this ground alone was the judgment reversed.

Afterward, Mastin brought suit against the defendants to recover back the amount paid as aforesaid by Coates in satisfaction of the judgment in the Jackson circuit court, setting out the reversal thereof by this court, and claiming as purchaser of the assets from the assignee a right of action therefor. He was defeated in this suit, on the ground that even if there was an existing demand in

favor of the assignee (which was not decided), he did not become the owner of it by his purchase: *Mastin v. Stoller*, 107 Mo. 317, decided at the October term, 1891, of this court.

In the mean time, Coates having died, the plaintiff was, on the twelfth day of November, 1887, duly appointed and qualified as his successor, and on the nineteenth day of December, 1887, thereafter, instituted this suit to recover from defendants the money so received by them from Coates on the 23d of February, 1882.

At the close of the evidence, each party asked for a peremptory instruction for a verdict in his favor, which the court refused, and submitted the case to the jury upon instructions to the effect that they should find for the plaintiff, unless they should find from the evidence "that the defendants accepted the sum of three thousand three hundred and six dollars and sixty-six cents in full payment and satisfaction, compromise, and settlement ⁶⁵¹ of the judgment defendants had on January 7, 1882, recovered against Coates, assignee."

The jury returned a verdict for the defendants and the plaintiff appeals, complaining of the instructions, in that they predicate the right of defendant to a verdict upon the idea of the payment of the judgment by way of compromise, when, as they contend, there was no evidence of a compromise, and the assignee had no authority to compromise.

1. It is sometimes laid down as a general rule that money paid on a judgment that is afterward reversed may be recovered back in an action for money had and received. The great majority of the cases which are cited in support of this rule are cases in which payment of the judgment in whole or in part has been coerced by process thereon or otherwise.

These cases are, of course, not in conflict with the well-settled principle of law that one who voluntarily pays money with full knowledge of all the facts, and without any fraud having been practiced upon him, cannot recover it back because at the time of the payment he was ignorant of, or mistook, the law as to his legal liability.

This doctrine has been frequently applied to payments on judgments that have been afterward reversed, and in some of the cases it has been held that if the payment was voluntary no recovery could be had—making the case turn upon the single fact of voluntary payment. Of this class of cases, the recent case of *Gould v. McFall*, 118 Pa. St. 455, 4 Am. St. Rep. 606, is an example.

There are other cases in which a right of recovery has been maintained, although the judgment was voluntarily paid, of which class *Scholey v. Halsey*, 72 N. Y. 578, is an example.

In this latter class of cases it will be found that, upon the facts, the action was maintained upon the ground ⁶⁵² that although the payment was voluntary, yet, the defendant having received the money of the plaintiff to which *ex aequo et bono* he was not entitled, the same was recoverable by writ of restitution or by action in *assumpsit* for money had and received.

But it is believed that no well-considered case can be found in which it has been held, where money has been voluntarily paid on account or in satisfaction of a judgment afterward reversed, and the party to whom it was paid in equity and good conscience was entitled to the same, that it could be recovered back. To so hold would be entirely repugnant to the very principle upon which the action is founded. As was said in an early case by Chase, C. J.: "The plaintiff cannot recover unless the defendant's retaining the money is contrary to equity and right. . . . The defendant may resort to any equitable or conscientious defense to repel the claim of the plaintiff, and may show the justice of his original claim": *Green v. Stone*, 1 Har. & J. 408.

The justice of the defendant's original claim is not only shown by the conceded facts of this case, but the justice of the judgment set aside was established in the judgment of this court upon appeal therefrom. The defendants lost the benefit thereof merely by "a slip" in their own procedure, and ought not to be compelled to refund the money which they rightfully received, and which, in equity and good conscience, they may retain. So that if the court committed error in the instruction complained of, in requiring the defendants to show that the payment, made in full satisfaction of the judgment, was also made in compromise of their claim, it was an error in plaintiff's favor, of which he cannot complain. The judgment is for the right party, and is affirmed.

All concur.

JUDGMENTS—REVERSAL—RECOVERY OF MONEY PAID TO SATISFY.—A defendant in execution who voluntarily pays a claim pending an appeal from the judgment, for the purpose of avoiding an execution sale of his property, is not entitled to restitution, although, on the subsequent argument of the writ of error, the judgment was reversed and set aside: *Gould v. McFall*, 118 Pa. St. 455; 4 Am. St. Rep. 606. and note; but in *Ex parte Walter*, 89 Ala. 237, 18 Am. St. Rep. 103, it was held that money paid on a decree of court is not voluntarily paid, and upon its reversal the party paying the money is entitled to restitution, regardless of the final

determination of the rights of the parties. Restitution will be enforced though the money was not received under an execution nor under a final judgment: *Haebler v. Myers*, 132 N. Y. 363; 28 Am. St. Rep. 589, and note. See, also, the extended note to *Little v. Bunce*, 28 Am. Dec. 368.

INSTRUCTIONS—HARMLESS ERROR.—Though a charge to the jury is erroneous, yet if it manifestly works no injury to the losing party, the judgment will not be reversed: *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277; 47 Am. St. Rep. 103; *Brandon v. Carter*, 119 Mo. 572; 41 Am. St. Rep. 673; *Gray v. Merriam*, 148 Ill. 179; 39 Am. St. Rep. 172; *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 138.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

SPRINGER v. SHAVENDER.

[118 NORTH CAROLINA, 83.]

JURISDICTION—AVERMENTS OF PLEADING.—The power to decide, in any case, does not rest solely upon the averments of a pleading.

JURISDICTION—ADMINISTRATION UPON ESTATE OF LIVING PERSON—COLLATERAL ATTACK.—The only jurisdiction a court of probate has, in respect to the administration of estates, is over the estates of dead persons. Hence, administration granted upon the estate of a living person, though he is supposed to be dead, is an absolute nullity, and may be collaterally attacked. The death is a fundamental prerequisite to the exercise of jurisdiction, because, until the death occurs, there is no subject matter.

JUDGMENT.—**JURISDICTION** of the person and subject matter is essential to the validity of a judgment.

ESTOPPEL BY JUDGMENT.—Nothing but a valid judgment will operate as an estoppel upon any one.

COURTS—PRECEDENTS.—A court should always rely upon a substantial reason or a fundamental principle rather than upon an ill-considered precedent.

JURISDICTION IS THE RIGHT to adjudicate concerning the subject matter in a given case.

JUDGMENT, WHEN VOID — JURISDICTION — CONSENT OR NEGLECT.—A judgment is void, not voidable, if the court has no jurisdiction of the subject matter of the action; and jurisdiction of such subject matter cannot be conferred by the assent or neglect of a person.

ESTOPPEL BY JUDGMENT—COLLATERAL ATTACK.—A judgment void for want of jurisdiction of the subject matter cannot conclude any person, and may be collaterally attacked.

ESTOPPELS MUST BE MUTUAL.

ESTOPPEL BY JUDGMENT THAT LIVE PERSON IS DEAD.—If administration is granted upon the estate of a living person, supposed to be dead, and there is a decree for the sale of his land, in a proceeding to which all of his children and heirs at law are made parties, and his death is alleged and admitted in the

pleadings, the decree does not operate as an estoppel upon the heirs, in a collateral proceeding by them to recover possession from those claiming through the purchaser at the sale, because of the declaration of the court that their ancestor was dead when, in fact, he was alive, and because they did not appeal from that finding, and have it reversed, or institute a direct proceeding to set it aside. The decree is absolutely void, both as to the ancestor and his heirs, for want of power in the court to exercise jurisdiction over the estate of a live man, and, being void, it works no estoppel.

Petition to rehear the case of *Springer v. Shavender*, 116 N. C. 12; 47 Am. St. Rep. 791. In this controversy, it appears that one W. G. Jarvis, as the administrator of one George W. Dixon, instituted proceedings to sell the land of his intestate, it being the land in controversy. Jarvis alleged, in his petition, that the personalty had been exhausted, and that such sale was necessary to discharge the outstanding debts of the estate. The petition also alleged that Dixon had died intestate, and that letters of administration had been granted to the petitioner. In this proceeding all the children and heirs at law of Dixon were made parties, and personal service was had upon them. The defendants admitted the allegations of the petition, and the court, after reciting the fact of personal service, and finding the facts alleged in the complaint to be true, decreed that the land be sold as prayed for. The land was purchased at the sale by R. C. Windley, and, the sale being confirmed, he received the administrator's deed on May 17, 1882. In 1886, Windley conveyed the land to the petitioner, Springer. The defendant, Shavender, claimed the land under a deed executed by the children and heirs at law and widow of Dixon, dated November 14, 1887. It was on the trial of the case, which was an action for trespass in cutting trees and removing timber from the land, that, as the children, under a misapprehension of the facts, admitted the allegation of the petition that their ancestor was dead, and submitted to a decree for the sale of his land by his administrator for assets, the title of the petitioner could be collaterally defeated by showing that George W. Dixon was alive at the time of the institution of the probate proceedings to sell his land. It was shown that he was then alive. The supreme court, in *Springer v. Shavender*, 116 N. C. 12, 47 Am. St. Rep. 791, affirmed the ruling of the trial judge, and this petition for rehearing was filed, the basis of which appears in the opinion.

Shepher & Busbee, W. B. Rodman, and J. H. Small, for the petitioners.

Charles F. Warren and J. W. Hinsdale, opposed the petition.

⁴¹ AVERY, J. The basis of the application to rehear and reverse the former ruling of this court (*Springer v. Shavender*, 116 N. C. 12, 47 Am. St. Rep. 791), is the contention that there was error in holding that the children of George W. Dixon were not concluded by the finding in the special proceeding, instituted by his administrator to sell the land in controversy, and to which said heirs were parties, that he was then dead, though it is now found by the jury that he was in fact alive when the administrator issued the summons, and when the land was sold under the decree for assets. The question presented is, whether the doctrine of estoppels applies to and binds the children, who, since Dixon's death, have brought suit to recover possession from those claiming through the purchaser at the sale, and it depends for its solution upon the answer to the preliminary question, whether the judgment is in law utterly void or only voidable. The contention of the defendant rests upon the erroneous assumption that a judgment void for want of jurisdiction of the subject matter is *prima facie* conclusive on the parties and protected from collateral attack, as it is where the authority to deal with the subject matter is conceded, and it is proposed to impeach the decree, because of an incorrect finding in the record that a party waived personal service by appearance or otherwise, submitted to the authority of the court. The fundamental and inherent difference between the two kinds of judgments grows out of the fact that the ⁴² right to be present in court and have an opportunity to defend an action, where it is proposed to adjudicate one's title to property, is a personal one, and a party may waive by acquiescence, or by neglect even, the requirement of the statute that notice or summons shall be actually served, or served in a specified manner or within a given time, while the authority of the court to take jurisdiction of the subject matter is derived from an express grant by the sovereign state in the constitution and laws made in pursuance of it, and, like any other agent acting under a power, a judicial tribunal is not warranted in going beyond the limits of "the law of its creation" fairly construed: *Thomas v. People*, 107 Ill. 517; 47 Am. Rep. 458; *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746; *Scott v. McNeal*, 154 U. S. 34, 46. The law under which the jurisdiction of a clerk is exercised is the provision of the constitution (Const., art. 4, sec. 12) which empowers the legislature to allot and distribute the jurisdiction conferred by the organic law amongst those courts inferior to the supreme court, and the statute (Code, sec. 1436) which, in pursuance of the provision of the constitution, authorizes the

institution of a special proceeding. "When the personal estate of a decedent is insufficient to pay all his debts . . . to sell the real property for the payment of the debts of such decedent."

In discussing the contention that such judgments, as that rendered in the special proceeding, are liable to collateral attack, the supreme court of Texas gives its sanction to the principle upon which the former opinion in this case rests, as follows: "This [the rule that judgments cannot be collaterally impeached] cannot be universally true, because, in the case of an administration upon the estate of a living man, the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment, and ⁴³ in such case, although every step in the proceeding by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good faith, no title passes or can pass": *Withers v. Patterson*, 27 Tex. 497; 86 Am. Dec. 643. But the learned counsel for the petitioner intimated that the court of Texas was out of line with the current of authority in holding such decrees void for want of power in the court to pronounce them, without actually acquiring jurisdiction over the subject matter in the manner prescribed by law. It would seem therefore but proper that somewhat extended quotations and numerous citations should be made to show that the contention is not well founded.

"Jurisdiction," said the supreme court of Illinois in *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458, "in the general and most appropriate sense of that term, as applied to the subject matter of a suit, is always conferred by law, and it is a fatal error to suppose the power to decide in any case rests solely upon the averments of a pleading." Quoting from *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746, the court said of the appeal before it: "If this case falls within any class of cases, it is a class in which no court has any right to deliberate or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the county court has in respect to the administration of estates is over the estates of dead persons. It would seem that the bare statement of such a proposition is enough without citing authority."

In enumerating the classes of cases in which decrees of probate courts are utterly void, and those where the court has jurisdiction of the subject matter, but by some mistake issues letters testamentary irregularly or illegally, the court of New Hampshire classified our case among those void for want of jurisdiction.

"So," said the court, ⁴⁴ "where a will is proved or letters are granted, when the person supposed to be dead is still living, the powers of the courts being limited to the estates of deceased persons: *Morgan v. Dodge*, 44 N. H. 259; 82 Am. Dec. 213. An examination of the authorities cited in *Scott v. McNeal*, 154 U. S. 47, to sustain the proposition that where a probate court adjudges that a man is dead when he is alive, the judgment is invalid, shows that in the following cases such a decree was held to be "absolutely void for all purposes and ab initio": *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746; *Thomas v. People*, 107 Ill. 517; 47 Am. Rep. 458; *Stevenson v. Superior Court*, 62 Cal. 60; *D'Arusment v. Jones*, 4 Lea, 251; 40 Am. Rep. 12; *Perry v. St. Joseph etc. R. R. Co.*, 29 Kan. 420.

In the case of *Scott v. McNeal*, 154 U. S. 47, the only question presented was, whether the alleged intestate was bound by the probate proceeding to which his heirs were parties and in which the court had found that he was dead, when he appeared in person before the court, and, of course, it was only adjudged that he was not estopped from denying the title of the purchaser under a decree to sell his lands for assets. But on page 43 the court said: "The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other states." The second authority cited in support of the proposition was *State v. White*, 7 Ired. 116, where the obligor on a bond executed as administrator of an alleged intestate, not the intestate himself, was allowed to impeach the grant of letters collaterally. The court, after citing an array of authorities, call attention (as did this court in the former opinion) to the fact that the case cited in the petition from *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, is not sustained by authority elsewhere, was seriously criticised by Chief Justice Redfield, and subsequently ⁴⁵ explained by the court which rendered it, as governed by a statute somewhat peculiar in its terms.

No man can put himself in the place of the sovereign and make the adjudication of a court valid by ratifying an unauthorized exercise of power by its agent, when the law of the land, which is the agent's power of attorney, declares that the court has no authority to render the judgment. It was upon this principle that this court, in *State v. White*, 7 Ired. 116, allowed the obligor, upon the plea of the general issue, to show that the alleged intestate of the plaintiff, to whom letters of administration had been issued, was alive when the letters were granted. If he

was alive, the subject matter was wanting, and there was no jurisdiction in the probate court. This court may be supposed to have known that the facts in *London v. Wilmington etc. R. R. Co.*, 88 N. C. 588, 589, were not such as to make it direct authority to support this principle, but it is authority to show that the court there cited *State v. White*, 7 Ired. 116, with approval, and distinguished *London v. Wilmington etc. R. R. Co.*, 88 N. C. 588, 589, from it, as subsequently the same principle was adverted to in *Garrison v. Cox*, 95 N. C. 353, and other cases cited for the purpose of distinguishing them and not in support of the opinion. After citing *State v. White*, 7 Ired. 116, with approval, the court said: "If the person on whose estate the court undertakes to grant letters testamentary or of administration be dead, and at the time of his decease have his domicile or have bona notabilia to be administered, it matters not how irregular may be the proceedings of the court, or how obscured and incomprehensible its conclusions, they afford sufficient authority to cover the bona fide transaction of its appointees." The court thus clearly sustained the doctrine already stated, that irregularities in appointing administrators would not invalidate their acts where it appeared that there was a dead man, and jurisdiction⁴⁶ consequently of the subject matter—his estate—and, on the other hand, by citing, with approval, *State v. White*, 7 Ired. 116, to sustain the proposition, that whenever it appeared, even by way of collateral attack, there was no dead man, the jurisdiction would be declared defeated and the decree treated as void.

Upon examination, it will be found that this distinction has been followed by all text-writers and all the appellate courts of this country that have had occasion to discuss the subject, with the single exception of the court of New York, which rests its ruling, as has been stated, upon the peculiar provisions of the code of that state.

This court, in *Collins v. Turner*, Tayl. 105 (54), sustained the principle, upon which the decision in this case rests, by holding that the grant of letters of administration, on the other hand, in a county where the court had no jurisdiction of the subject matter, was utterly void and might be attacked collaterally, thus marking the distinction between that and the case where, dealing by proper authority with the subject matter, the court has inadvertently deprived the lawful claimant of the administration. In the early case of *French v. Frazier*, 7 J. J. Marsh. 425, the court, upon the principle that an administration upon the estate of a person then alive was void for all purposes and could be im-

peached collaterally, held, as did this court in *State v. White*, 7 Ired. 116, that a debtor of the alleged decedent could set up the plea that the plaintiff was not administrator.

The distinction which seems to have been overlooked by the petitioner in this case is, that while none but parties are bound by a decree, and while the want of actual service may be waived, a judgment, where there is want of jurisdiction of the subject matter, is void as to all persons, and consent of parties can never impart to it the vitality ⁴⁷ which a valid judgment derives from the sovereign state, the court being constituted, by express provision of law, its agent to pronounce its decrees in controversies between its people: *State v. White*, 7 Ired. 116.

It seems needless to pile up other authorities to sustain the proposition that where a court rests its right to jurisdiction of the subject matter upon a grant of power to deal with the estates of dead men, its decrees are absolutely void when the administration is by mistake upon the effects of a living person. Yet it is respectful to notice and follow the line of the argument on behalf of the petitioner, and to discuss the leading authority relied upon to support his contention. The supreme court of Washington rested its decision in *Scott v. McNeal*, 154 U. S. 34, upon the New York case, cited for the petitioner, but the supreme court of the United States on appeal pronounced it, as we have stated, insufficient authority. The court of Washington also held that the judgment was good even against the alleged intestate on his reappearance, on the ground that the probate court was required to find that a person was dead before the grant of letters, and the proceeding was, therefore, in effect one in rem, but this reason was also declared wholly insufficient. The court in *Scott v. McNeal*, 154 U. S. 34, laid down the proposition that "to give such proceeding any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit." The court go on to say that the death of the owner of an estate is "a fundamental prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license anyone to sell his land for the payment of his debts." If the death was a fundamental prerequisite to the exercise of jurisdiction, it was because, until the death occurred, ⁴⁸ there was no subject matter. If there was no jurisdiction for the want of authority over the subject matter, the decree was void, and consent or acquiescence in the decree could not impart vitality to it, so as to estop anyone. Grant that the

precise application of the governing principle had never been made before the decision of this case, still, if a court cannot render a valid judgment without jurisdiction of the subject matter of the action, and nothing but a valid judgment will operate as an estoppel upon anyone, it would seem that this court might safely rest its opinion upon principle without waiting to find a precedent. It is preferable always to rely rather upon a substantial reason or a fundamental principle, than upon an ill-considered precedent, but, in fact, the research of counsel has not enabled them to find a single authority in conflict with the opinion which they ask the court to modify.

The reasoning of the petition rests upon the idea that the same rule as to the binding effect of judgments is applicable where there is a defective service on some of the persons interested, as where there is a want of jurisdiction of the subject matter; and the petition is based upon a false construction of section 364 of 1 Herman on Estoppels, where the author is treating the question of personal service. In the succeeding section (365) the same writer explains that, where there is no service at all, the judgment is void and subject to collateral attack, but "if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon reasonable and proper application or reversed upon appeal." "The rule, therefore, deducible from the authorities [says the same author in the section referred to] may be thus stated: Where jurisdiction ⁴⁰ is acquired, no irregularity in the mode of exercising it can affect the judgment, when collaterally attacked," etc. The foregoing quotation shows as plainly as it is possible to prove it that the author relied upon to sustain the petition to rehear was, in the very section cited, discussing a finding by a court, not that it had jurisdiction of the subject matter, and not even that it had jurisdiction of the persons of the parties when no service at all had been made, but a finding where the service was only apparently irregular, that there had been in fact no defect.

But the section relied upon is authority for the position that a void judgment is not protected from collateral attack and works no estoppel even on a party to the proceeding in which it purports to have been rendered. The same author (1 Herman on Estoppels, sec. 364) says that the necessary elements of a good plea of *res adjudicata* are not only that there should have been a final judgment between the same parties for the same cause of

action, but "the principal element is, that it must be a valid judgment. That is, it must be rendered by a court legally constituted, having jurisdiction of the cause and the person. Without jurisdiction there is no validity or vitality to the judgment. In order to give validity to a judgment of a court there must be jurisdiction of the cause and of the person."

The question here is, whether the judgment operated as an estoppel upon the heirs because of the declaration and finding of the court that their ancestor was dead when he was in fact alive, and because they did not appeal from that finding and have it reversed or institute a direct proceeding to set it aside. The author relied upon, as appears from citations already made, declares that such findings are conclusive as to the fact of service, when collaterally attacked, not where there was no service and no jurisdiction of the person at all. Of course, the inference ⁵⁰ would be, if nothing further appeared, that no such finding could give jurisdiction of the subject matter because it set forth that a live man was dead any more than would the finding that service had been had on a party, when no process had been issued against him. But Herman does not leave us to conjecture or to determine by reasoning upon principle what are his views upon this subject. In section 65 he says: "Jurisdiction is given by law, and cannot be conferred by consent of the parties; but a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject matter. Jurisdiction must either be of the cause, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or of the person, which is acquired by actual service of process or personal service of defendant." This is the well-established doctrine, that a person may waive the right to demand personal service of process on him, because it is a question affecting only his personal rights, and the adjudication of a court that there was no irregularity in service is deemed, *prima facie* only, to be correct.

In stating what is essential in order to give conclusive effect to a judgment, Bigelow in his work on Estoppel, page 57, says: "In the next place, the judgment must have been valid. If, for want of jurisdiction, or for any other reason, it was void, it will have no effect, though it was otherwise, as we shall see, if it was only voidable": Citing the opinion of Judge Cooley in *Nixon v. Stephens*, 17 Mich. 518; 97 Am. Dec. 205. "It is necessary that both the person of the defendant and the subject matter of the suit should be fully within the cognizance of the court either

at the beginning or in the course of the action." As illustrating the principle that only valid judgments work an estoppel, the author cites two leading cases from the courts of New ⁵¹ Jersey. In the first of these (*School Trustees v. Stocker*, 42 N. J. L. 116) the court laid down the principle that jurisdiction over the subject matter of a suit "cannot be conferred by consent, nor can the right to object to a want of it be lost by acquiescence or neglect." The court said: "If the question were one merely of jurisdiction as to a party defendant not properly brought into court for want of process or for defective service of it, the objection would be well taken. This kind of jurisdiction may be obtained by consent, or the want of it may be waived by consent or failing to take advantage of it at the proper time. But in the case before us the difficulty lies much deeper. The question here is, not whether a competent court had obtained jurisdiction of a party triable before it, but whether the court itself is competent under any circumstances to adjudicate a claim against the defendant below." Another authority cited by the author was *Dodd v. Una*, 40 N. J. Eq. 672, where the court held that a petitioner, or one who concurred in the prayer of the petitioners in an equitable proceeding, and who not only acquiesced in but prayed for and invited the action of the court, was not precluded from questioning its jurisdiction to render a decree. The court in that case cited as the most "concise and complete definition of jurisdiction that of Chief Justice Beasley in *Munday v. Vail*, 34 N. J. L. 422, who defined it to be, "the right to adjudicate concerning the subject matter in a given case."

If it were necessary, numberless authorities might be added in support of the propositions: 1. That a judgment is void, not voidable, if the court has no jurisdiction of the subject matter of the action; 2. That where a judgment is invalid for want of jurisdiction of the very subject matter, its authority over which must be derived from a grant from the sovereign state, the assent or the neglect of a ⁵² person cannot confer on it the power which the state has failed to vest in it, though a person may thus waive the assertion of his rights of a purely personal nature; 3. That a judgment void for want of jurisdiction of the subject matter cannot conclude any person, whether a party or stranger to the proceeding. This position is sustained by the authorities cited by Bigelow and referred to above, if it be necessary to cite additional authority to prove that there is no estoppel without jurisdiction, and that no individual can exercise the power of the government to give jurisdiction where the law does not confer it, and thereby

estop himself, when every other person is left at liberty to plead in avoidance the want of authority in the court.

Upon the former hearing, as upon the rehearing, the conclusion of the court rests upon the two plain propositions, that the judgment in the special proceeding was void for want of power in the court to exercise jurisdiction over the estate of a live man, and the deduction from it, that, being void, it worked no estoppel.

If additional reasons are necessary to sustain the opinion on the former hearing, the acknowledged test of the conclusiveness of a decree upon a party in such cases may be applied, and would be involved in the question whether the purchaser, through whom the plaintiff claims, and by reason of his privity with whom he insists that the heirs of Dixon and their assignees are concluded, would have been estopped by the finding from paying the amount of his bid (thirty dollars) had he discovered before payment that Dixon was alive. Estoppels must be mutual, and, in order to operate mutually in this case, the decree must have been conclusive, as to the very finding insisted upon, both on Windley the purchaser and the heirs of Dixon. This is an action for possession, in which the question whether the purchase money paid by Windley shall be restored is ⁵³ not raised, and cannot be considered. The heirs of Dixon, who were sui juris, might have waived personal service and given the court jurisdiction of their persons, but they could no more impart the vitality, which is essential to the operation of the doctrine of estoppel, to a judgment rendered against a live man under authority applicable only to decedents, than they could confer any other authority which the constitution empowers the legislature "to allot and distribute" among other courts prescribed in the constitution, or which may be established by law: Const., art. 4, sec. 12.

If it had appeared upon the record that George W. Dixon was alive when the special proceeding was instituted and when the decree of sale was granted, the judgment would have been pronounced a nullity without proof aliunde that he was not dead. There is no sufficient reason to adopt the suggestion of the petitioner and modify the proposition to this effect in the former opinion of the court.

The petition is dismissed.

JUDGMENT.—**JURISDICTION** is the right to adjudicate concerning the subject matter in a given cause: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366. When it appears from the whole record that a court has no jurisdiction over the person or subject matter, the judgment is void, and will be so treated in collateral proceedings: *Hope v. Blair*, 105 Mo. 85; 24 ALI. St. Rep. 366, and note; *Wayne v.*

Caldwell, 1 S. Dak. 483; 36 Am. St. Rep. 750. The subject matter of jurisdiction is to be found in the allegations of the litigants, and not to be ascertained outside of them: Note to Two Rivers Mfg. Co. v. Beyer, 17 Am. St. Rep. 143, on void judgments. Consent of parties cannot confer jurisdiction as to the subject matter of an action: Note to Keeler v. Stead, 7 Am. St. Rep. 323.

COURTS—RULES AND PRECEDENTS.—A court of equity must be guided by established rules and precedents. It has no more right than has a court of law to act upon crude notions of what is right in a particular case: Sell v. West, 125 Mo. 621; 46 Am. St. Rep. 508.

JUDGMENTS—ESTOPPEL.—All proceedings based upon void judgments are absolute nullities, irrespective of notice or bona fides: Note to Two Rivers Mfg. Co. v. Beyer, 17 Am. St. Rep. 143. A void judgment is not an estoppel, and may be collaterally attacked: Springer v. Shavender, 116 N. C. 12; 47 Am. St. Rep. 791, and note; note to Dyer v. Leach, 25 Am. St. Rep. 173. An estoppel must be mutual. It must bind both parties, and one who is not bound by it cannot take advantage of it: First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296; 43 Am. St. Rep. 247.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATION ON PROPERTY OF LIVING PERSON.—The general rule is, that a judgment cannot be collaterally impeached by oral evidence of facts outside of the record of the case in which the judgment was rendered: Cruzen v. Stephens, 123 Mo. 337; 45 Am. St. Rep. 549. But letters of administration on the estate of a living person are absolutely void: Springer v. Shavender, 116 N. C. 12; 47 Am. St. Rep. 791; Scott v. McNeal, 154 U. S. 34. Hence, although the children of a person, under a misapprehension of facts, admit an allegation, in a proceeding for the sale of their ancestor's land by his administrator, that he is dead, and submit to a decree for the sale of the land, yet they may impeach such decree in a collateral proceeding, and avoid the estoppel of title derived through it by showing that their ancestor was living at the date of the decree: Springer v. Shavender, 116 N. C. 12; 47 Am. St. Rep. 791.

TATE v. BATES.

[118 NORTH CAROLINA, 287.]

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—JOINDER OF CAUSES.—A cause of action against the directors of a bank for the loss of a deposit occasioned by their fraud, neglect, and mismanagement necessarily lies in tort, as the depositor's contract was with the corporation and not with the directors; but, even if it is *ex contractu*, it may be joined with causes of action for fraud and deceit, as all of the causes of action "arose out of the same subject matter."

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—PARTIES PLAINTIFF.—A single depositor may, in his own name, maintain an action against the directors of an insolvent bank for the loss of a deposit occasioned by their fraud, neglect, or mismanagement.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—AVERMENT AS TO KNOWLEDGE OF INSOLVENCY.—An averment in a complaint against the directors of an insolvent bank for the loss of a deposit occasioned by their fraud, neglect, and mismanagement, that the defendants "willfully and fraudulently made false and misleading statements of the condition of the bank, and declared and paid dividends" when the earnings did

not justify it, "to conceal the true condition of the bank" and "to induce the public to make deposits therein," sufficiently charges that the defendants "knew or believed that the bank was insolvent," without a direct statement to that effect.

BANKS—INSOLVENCY—DIRECTORS—LIABILITY—PRESUMPTION—FRAUD.—The directors of a bank are conclusively presumed to know its condition. It is their duty to know whether it is insolvent, and it is fraudulent in them to put forth official statements that the bank is solvent when they do not know it to be true; and they are, therefore, liable to those who are deceived thereby into having dealings with the bank, or making deposits therein for losses sustained.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSITS, NEW AND OLD.—If the directors of an insolvent bank make false and fraudulent statements to a state treasurer as to its condition, in order to conceal its insolvency, and thereby induce him not only to make new deposits of public funds, but also to permit a part of the funds deposited by his predecessor in office to remain, they are liable in case of loss for all of the deposits, both new and old.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—PARTIES DEFENDANT—PLEADING.—If the directors of an insolvent bank are sued for the loss of a deposit occasioned by their fraud, neglect, and mismanagement, neither the bank nor its receiver is a necessary party, and the plaintiff need not allege that the bank or its receiver had been requested to bring the action, and had refused to do it.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT.—NO CAUSE OF ACTION is stated against the directors of an insolvent bank, sued for the loss of a deposit occasioned by their fraud, negligence, and mismanagement, by averments that the vice-president permitted the president and cashier to borrow from the bank large sums of money "upon inadequate security," and that such loans were fraudulently suppressed and not included in the official reports of the condition of the bank, if there is no allegation that the loans were lost, or cannot be collected, or that their loss caused the insolvency of the bank, or in any wise injuriously affected the plaintiff.

APPEAL—ASSIGNMENT OF ERROR—NO CAUSE OF ACTION—DEMURRER.—It may be urged on appeal that no cause of action is stated, although such defect is not specifically assigned by demurrer.

Action by Tate against Bates and other directors of the insolvent Bank of New Hanover to recover for the loss of a deposit, alleged to have been caused by their fraud, neglect, and mismanagement. Tate was state treasurer of North Carolina, having succeeded in that office one D. W. Bain, who, as treasurer, had deposited large sums of money in the bank, of which the defendants were directors. Tate, being misled by statements made of the satisfactory and solvent condition of the bank, permitted a large part of the sums deposited by Bain to remain in the bank, as well as other amounts deposited by sheriffs to the credit of the plaintiff, from time to time, amounting in all to fifteen thousand dollars. The complaint set up three causes of action, and there

was a demurrer to each. There was also a demurrer to the whole complaint upon the ground of misjoinder of causes of action. Tate's term of office having expired since the commencement of the action, his successor in office, W. H. Worth, was, upon the motion of the plaintiff, made a party plaintiff. A non pros-
equitur was entered as to Clayton Giles. The receiver of the bank, Junius Davis, and the bank itself, were ordered to be made parties. The plaintiff then, by leave of court filed an amended complaint, setting up the facts as to new parties, and the receiver's failure to bring an action against the directors, as requested, for the benefit of all the creditors, but making no change in any of the allegations of the original complaint. Davis answered the amended complaint touching the allegations as to him and his actions. The fact that the vice-president permitted the president and cashier to borrow large sums of money for themselves, etc., was stated in the third cause of action, which is the main subject of discussion in the opinion on the plaintiff's appeal. The demurrer to the first cause of action was overruled; so was the demurrer to the second; but the demurrer to the third cause of action was sustained upon the ground that the complaint, as to the third cause of action, did not state a cause of action. Both sides appealed.

F. H. Busbee and W. R. Allen, for the plaintiff appellant.

J. W. Hinsdale, for the defendant appellants.

307 CLARK, J. The grounds of demurrer which were not cured by the amendments allowed to the complaint, and which were overruled by his honor, are in substance:

1. "That a cause of action for the negligence and mismanagement of the defendant is ex contractu and cannot be joined in an action against them for fraud and deceit."

The same point was raised in *Solomon v. Bates*, 118 N. C. 311, post, p. 725, and *Calwell v. Bates*, 118 N. C. 323, and it was there held that plaintiff's contract of deposit was with the corporation, not with the defendant directors, and hence the cause of action against the directors for the loss of the deposit caused by their neglect and mismanagement was necessarily in tort, not in contract, but if it had been in contract it could have been joined with the causes of action for fraud and deceit because all the causes of action "arose out of the same subject matter."

2. "That the plaintiff, a single depositor, cannot maintain the action in his own name, but must bring a creditor's bill."

The directors being trustees for creditors and stockholders, as

well as for the corporation, any creditor or stockholder who has been misled to his hurt by their fraud and deceit, or injured by their misconduct and gross neglect in discharge of the trust, can maintain an action for such injury against them personally in his own behalf. If this were a proceeding to wind up the affairs of the corporation and apply its assets to the debts, then a creditor's bill would have been eminently proper, but such is not the object of this action. There is no fund to be taken in hand to be administered and disbursed.

3. "That the allegation of a cause of action for fraud and deceit is not sufficient unless it is specifically charged that the defendants knew or believed the bank to be ³⁰⁸ insolvent." The allegation of the complaint is, that the defendants willfully and fraudulently made false and misleading statements of the condition of the bank, and declared and paid annual dividends of over twenty thousand dollars, when there were no net earnings out of which they could be declared, and that such statements of the condition of the bank and of the declaration of the dividends were published in the press with the knowledge and consent of the directors, and that they also willfully and fraudulently caused to be published semi-annual statements, sworn to by the president or cashier, and verified by three directors, showing in substance that the bank was solvent, its capital unimpaired, and that it had a surplus on hand; that this was done to conceal the true condition of the bank, which was utterly insolvent, and to induce the public to make deposits therein, and that the plaintiff's predecessor in the office of state treasurer was misled thereby and made this deposit, and that the plaintiff, succeeding to the office, also relying upon such official statements, allowed such part of the fund as was not drawn out for incidental purposes to remain, and permitted further sums to be deposited therein to his credit by sheriffs. This is a brief summary of the allegation, which is stated more fully in the complaint. It would seem that this was a quite explicit charge that the defendants 'knew or believed that the bank was insolvent.' But, if it were not, the directors are conclusively presumed to know the condition of the bank: *Hauser v. Tate*, 85 N. C. 81; 39 Am. Rep. 689; *Morse on Banks and Banking*, sec. 137; *Finn v. Brown*, 142 U. S. 56; *United Soc. v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731; and other cases cited in *Solomon v. Bates*, 118 N. C. 311; post, p. 725. If the directors did not know the bank was insolvent, it was their duty to have known it. It was fraudulent in them to put forth official statements that the bank was solvent, when they did not

know it to be ³⁰⁹ true, and they are liable to those who were deceived thereby into having dealings with the bank, or making deposits therein, for any losses sustained. If this were not so, the directors of a bank would be privileged to be negligent, and the more ignorant they could manage to be about its condition the more secure they would be from any liability.

4. "That the defendants were not liable for money which the plaintiff's predecessor deposited in bank and which the plaintiff permitted to remain." The complaint avers that the plaintiff, misled by the false and fraudulent statements put forth by the directors as to the condition of the bank in order to conceal its insolvent condition, and relying thereon and upon similar statements made to him as treasurer, as required by law, not only made new deposits, but permitted a part of the deposit already in said bank to remain. If the defendants are liable as to one, they are as to the other. To hold otherwise would be to make "a distinction without a difference."

5. "That it is not alleged that the bank or the receiver had been requested to bring this action and had refused." This was not requisite, nor was the bank or receiver necessary parties to the action against the directors (*Solomon v. Bates*, 118 N. C. 311, post, p. 725, but, if it were otherwise, all these objections were removed by the amendment making the bank and the receiver parties to this action. All the grounds of demurrer, based upon *Clayton Giles* being a party, are also removed from consideration by the non prosecutur which was entered as to him.

No error.

PLAINTIFF'S APPEAL IN SAME CASE.

CLARK, J. That the vice-president permitted the president and cashier to borrow large sums of money for themselves, ³¹⁰ or for corporations practically owned by them, upon inadequate security, and fraudulently suppressed such loans in making up the official reports of the condition of the bank, and that the directors knew, or by due diligence ought to have known, of such conduct, is admitted to be true by the demurrer. A cause of action on this ground, if otherwise sufficiently stated, is not a misjoinder, for it is simply an allegation of one of the many acts of negligence, recklessness, and failure of duty which go to make up the liability of the defendants, as set forth in the first and second causes of action, nor was there a failure to state a cause of action for any of the reasons set out in the demurrer, i. e., that the bank or receiver had not been requested to bring the action (which in point of fact is alleged), nor because there was no priv-

ity between the plaintiff and defendants, nor because the deceit was not sufficiently charged, nor because the plaintiff is not averred to have made any new deposit, but had merely permitted the deposit already in the bank to remain there after his succession to office. All these grounds are disposed of by the opinion in the defendant's appeal in this case. It seems to us, however, that there was a failure to state a cause of action in the third cause of action, in that, though it is averred in the complaint that the loans recited in that cause of action were made "upon inadequate security" and were suppressed and not included in the official reports, it is not averred that they were lost or cannot now be collected, or that their loss caused the insolvency of the bank or in anywise affected the plaintiff injuriously. His honor, therefore, correctly held that a cause of action was not stated in this third cause of action, for a defect of that kind can be taken ex mero motu by the court below, or here, though not specifically assigned by demurrer.

No error.

BANK DIRECTORS—LIABILITY OF—LOSS OF DEPOSIT.—

The directors of a corporation are personally liable as trustees for a loss occasioned by a willful abuse of their trust, or by the misapplication of the funds of a moneyed corporation: Note to Tradesman Pub. Co. v. Knoxville etc. Co., 49 Am. St. Rep. 964. A depositor in a bank may recover from its directors for damages resulting to him from want of ordinary care and diligence in permitting it to be held out as solvent, when it was, in fact, insolvent: Note to Swentzel v. Penn Bank, 30 Am. St. Rep. 725; Solomon v. Bates, 118 N. C. 311, post, p. 725. The directors of a bank are personally liable, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the bank solely by false representations of solvency made to the general public by the directors, who ought to have known, and, by the use of ordinary care, such as it was their duty to have exercised, might have known, that such representations were false, and they are so liable whether such representations were made with the intent to defraud or not: Seale v. Baker, 70 Tex. 283; 8 Am. St. Rep. 592, and monographic note thereto on the liability of the directors of a corporation for misrepresentations of its solvency.

APPEAL—NO CAUSE OF ACTION.—The question whether a petition states facts sufficient to constitute a cause of action is never waived, and may be first raised in the appellate court: Smith v. Burrus, 106 Mo. 94; 27 Am. St. Rep. 329.

SOLOMON v. BATES.

[118 NORTH CAROLINA, 311.]

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—MISJOINDER OF CAUSES OF ACTION.—In an action against bank directors individually, a cause of action for negligence in the discharge of their duties, whereby the plaintiff lost his deposit in the bank, being one for a tort, may be properly united with causes of action for other torts, namely, the fraud and deceit of the directors in making false statements and misrepresentations as to the condition of the bank, whereby the plaintiff was induced to deposit his money therein, which was lost. There is no misjoinder, even if the cause of action for negligence were *ex contractu*, as there is the same "subject of action" throughout all the causes of action, which is the plaintiff's loss of his deposit.

BANKS—LIABILITY OF DIRECTORS FOR LOSS OF DEPOSIT—PLEADING—PARTIES.—The directors of a bank are jointly and severally liable for the loss of a deposit occasioned by their fraud, neglect, or deceit, without an averment, by the plaintiff, of any conspiracy or common purpose among them to cause such loss; and the bank itself may be joined, or not, as a party defendant, at plaintiff's election.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT.—One who has lost his deposit in a bank through the negligence, fraud, or deceit of its directors may maintain an action against them therefor, especially where it is admitted by demurrer that payment has been demanded of the bank, and that it is wholly insolvent.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT WITHOUT APPLICATION TO BANK OR RECEIVER TO SUE.—One who has lost his deposit in a bank through the negligence, fraud, or deceit of its directors may maintain an action against them therefor without first applying to the bank or its receiver to bring such action, and showing a refusal on the part of the bank or its receiver to sue.

BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—DECEIT—PLEADING.—It is not necessary, in charging deceit against the president and directors of an insolvent bank, whereby the plaintiff lost his deposit in the bank, to allege that, when the plaintiff made his deposit, the defendants knew or believed he would not get it back, or intended by deceit to obtain it from him, and to cause him to lose it. It is sufficient to allege that the bank, being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends, with a view to conceal its insolvent condition and to procure deposits, and that the plaintiff, being deceived thereby, made the deposit which he seeks to recover.

BANKS—LIABILITY OF DIRECTORS FOR FALSE STATEMENTS.—The directors of a bank are personally liable for a loss caused to a depositor by their false statements of the condition of the bank, published by their authority, when they knew them to be false, or might, with reasonable care, have known it. They are liable when they did not know the statements to be true, as well as when they knew them to be false, as it was their duty to know that they were true.

BANKS—LIABILITY OF DIRECTORS FOR GROSS NEGLIGENCE.—Bank directors are liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is, in fact, insolvent.

BANKS—LIABILITY OF PRESIDENT AND VICE-PRESIDENT FOR LOSS OF DEPOSIT.—The liability of the president and vice-president of a bank for the loss of a deposit occasioned by the negligence, fraud, or deceit of the directors, is the same as that of the directors.

Action against the directors of a bank to recover for a deposit lost through their negligence, fraud, and deceit. The demurrer of defendants was overruled, and they appealed.

Ricaud & Weill, H. G. Connor, and D. L. Russell, for the appellants.

Allen & Dortch and A. D. Ward, for the appellee.

312 CLARK, J. This is an action brought by a depositor in a bank, which has become insolvent, against the directors thereof personally. The first cause of action sets out that the defendants were directors; that under the by-laws, adopted by the stockholders and directors, it became the duty of the defendants actively to manage and superintend the business of the bank; to examine each Tuesday the discount-book, containing a statement of all loans made; to whom made, the securities therefor, and when due; to appoint, each three months, a committee of two from the board of directors to examine the books of the bank, its valuable effects, and other matters; to count the money on hand, and compare with the books, and report to the board of directors; that the defendants failed to perform these duties imposed by the by-laws, and, by reason of **313** such failure, large loans were made by the bank to insolvent persons upon inadequate security, and the bank became insolvent about the year 1889; that after the bank became insolvent, the defendants made annual statements to the stockholders, showing the bank to be solvent, its capital stock unimpaired, and a surplus on hand, and declared and paid out annual dividends of between twenty and twenty-five thousand dollars; that after the bank become insolvent, the defendants willfully and fraudulently caused semi-annual statements to be published in the newspapers, sworn to by the president or cashier, and attested and verified by three directors, showing the bank to be solvent, its capital stock unimpaired, and that it had a surplus on hand; that such statements were made for the purpose of establishing the credit of the bank, to conceal its real insolvent condition, and to induce the public to deal therewith and to deposit money therein; that the plaintiff

knew of such statements, and believing the same to be true, and relying thereon, made deposits with the bank in December, 1892, and in 1893, and allowed the deposits to remain therein, and the same were lost.

The second cause of action is the same as the first, except it alleges, in direct terms, that the defendants knew that the statements made and published by them were false.

The third cause of action alleges the duties imposed upon the defendants, as set out in the first cause of action, and their failure to perform them; that the bank became insolvent, and that the defendants had knowledge of this insolvency, and, with such knowledge, negligently and fraudulently permitted the bank to continue in business, and received the deposits of the plaintiffs, who were ignorant of the insolvency of the bank.

The fourth cause of action (by mistake numbered the ³¹⁴fifth) alleges the duties set out in the first cause of action, and, in addition, that from the year 1889 to the nineteenth day of June, 1893, the defendants, as directors, negligently and fraudulently caused and permitted standing advertisements to be published, falsely setting forth the solvency of said bank, with the purpose of inducing the plaintiff and the public generally to deposit and keep moneys in said bank; that at the time said statements were so made, said bank was insolvent, and the defendants knew, or ought to have known, of such insolvency; and that the plaintiff, relying upon such statements, and believing the bank to be solvent, made the deposits, etc.

The fifth cause of action (by mistake numbered sixth) is identical with the first cause of action, except the allegations as to the cause of the insolvency of the bank. In the first cause of action, it is alleged that many loans were made to insolvent persons, upon inadequate security and in this cause of action, that loans were made to insolvent persons, or, if made to solvent persons, the defendants negligently failed to connect, or to cause them to be renewed, and they became worthless.

The sixth cause of action (by mistake numbered seventh) is identical with the first cause of action, except in the fifth paragraph. In this cause of action, in addition to the allegations of the fifth paragraph of the first cause of action, it is alleged that many of the insolvent persons to whom loans were made, upon inadequate security, were relatives and favorites of the defendants and other officers of the bank, and some of them officers of the bank.

To this the defendants demurred on three grounds: "1. That there is a misjoinder of causes of action, in that several causes

of action in tort as for deceit by said defendants are united with a cause of action in contract ³¹⁵ against said defendants for failure to do their duty, and mismanagement as directors of the Bank of New Hanover; 2. That there is a misjoinder of parties defendant, in that the said defendants are severally charged with an intent and purpose to defraud the public and the plaintiff by holding out the Bank of New Hanover as a solvent institution, without alleging any conspiracy or common purpose among the defendants so to do; 3. That complaint does not state facts sufficient to constitute a cause of action in this, that it appears by the complaint that defendants deposited their money with the Bank of New Hanover; that the bank afterward suspended and was insolvent and failed to pay the plaintiffs on demand, and that plaintiffs claim the whole amount of their debt as damages against these defendants on the alleged fraud, but complaint does not allege that the bank has no assets, or that they cannot recover any part of the debt from the bank."

As to the first ground of demurrer: While breach of a duty imposed by statute or by express contract is *ex contractu*, the breach of a duty imposed by law arising upon a given state of facts is a tort: *Hodges v. Wilmington etc. R. R. Co.*, 105 N. C. 170. An action for damages for breach of duty in the latter case is an action for tort: *Bond v. Hilton*, Busb. 308; 59 Am. Dec. 552; *Williamson v. Dickens*, 5 Ired. 259. And even if there had been a special contract or a statutory provision, the plaintiff might sue for negligence in tort: *Robinson v. Threadgill*, 13 Ired. 39; *Purcell v. Richmond etc. R. R. Co.*, 108 N. C. 414. Here, the failure to discharge the duties required by the by-laws was a wrong caused by defendant's negligence—a tort, and is properly united in the same action with a tort by the fraud and deceit charged in the same complaint. Indeed, there was no contract ³¹⁶ between the directors, individually, and the plaintiff, and his remedy is for the tort, the wrong they have caused him by their misconduct: *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255. But had the failure to comply with the duties required by the by-laws been a cause of action *ex contractu*, there would still have been no misjoinder, for all the causes of action "arose out of the same transaction, or transactions connected with the same subject of action": Code, sec. 267, subd. 1; *Hodges v. Wilmington etc. R. R. Co.*, 105 N. C. 170; *Dawson Bank v. Harris*, 84 N. C. 206; *State v. Quinn*, 74 N. C. 359; *Hamlin v. Tucker*, 72 N. C. 502; *Heggie v. Hill*, 95 N. C. 303; *Benton v. Collins*, 118 N. C. 196. There is the same "subject of

action" throughout, i. e., the plaintiff's loss of his deposit. If this ground of demurrer had been well founded, the remedy would have been not to dismiss but simply to divide the action (Code, sec. 272; *Hodges v. Wilmington etc. R. R. Co.*, 105 N. C. 170; *Street v. Tuck*, 84 N. C. 605; *Finch v. Baskerville*, 85 N. C. 205), which would have caused a multiplicity of actions, with increased costs to the parties and the public as well, without any benefit, apparently, to the defendants.

As to the second ground of demurrer: The complaint does not allege several acts committed by different defendants, but that the defendants, acting together, committed the acts complained of. This would make them jointly and severally liable, and the averment of a common design or conspiracy is unnecessary: *Long v. Swindell*, 77 N. C. 176; *Mode v. Penland*, 93 N. C. 292.

As to the third ground of demurrer: The complaint alleges a demand for payment from the bank and that the bank is "wholly insolvent." As the demurrer admits this allegation, there can be no reason why the plaintiff should not prosecute, without further delay, whatever remedy he may have against the directors whose negligence, fraud, and ³¹⁷deceit he alleges to have been the cause of his loss. Besides, if the plaintiff was induced by the fraud perpetrated by the defendants in making and publishing the alleged fraudulent statement to part with his money, he can sue the agents, the directors, as well as the principal, the corporation, and can proceed against them jointly or severally: 3 *Thompson on Corporations*, secs. 4096, 4138, 4145. It is further insisted *ore tenus* that the action cannot be maintained because a cause of action is not stated:

"1. Because the action cannot be brought by a depositor or creditor, but must be brought by the corporation or the receiver, or at least that it must appear that application has been made to them to bring such action and that there had been a failure or refusal to do so." "For a breach of duty to their principal, the corporation, redress can only be had against the directors by that principal, the corporation (or its receiver), or by the shareholders, if the corporation (or its receiver) refuses to sue. But for any breach of duty toward a stranger to the company (as a creditor or depositor), such stranger may have redress against them (the directors) either at law or in equity according to the nature of the injury, and it will be no defense that their principal is also liable": 3 *Thompson on Corporations*, secs. 4132, 4138, 4145; *Delano v. Case*, 121 Ill. 247; 2 *Am. St. Rep.* 81. As to national banks, this may be otherwise as to them when a receiver has been

appointed, since the manner of enforcing the personal liability of the directors is prescribed by the United States Revised Statutes, sections 5234 and 5239; *Bailey v. Mosher*, 63 Fed. Rep. 488; contra, *Prescott v. Haughey*, 65 Fed. Rep. 653. But we do not here pass upon that proposition, for the defendants are sued as directors of a state bank.

"2. That the complaint is not sufficient as a charge of actionable deceit against the defendants, because it does ³¹⁸ not distinctly charge that the defendants, when the plaintiff deposited his money in the bank, knew or believed he would not get it back, or that they intended by deceit to obtain it from him or cause him to lose it." It is sufficient to allege that the bank, being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends, all this with a view to conceal its insolvent condition and induce the public to make deposits, whereby the plaintiff was deceived and made one deposit which he is now seeking to recover. Indeed, the directors are liable for injury caused by relying upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false: *Hubbard v. Weare*, 79 Iowa, 678; *Huntington v. Attrill*, 118 N. Y. 365; 42 Hun, 459; 3 *Thompson on Corporations*, sec. 4244. If bank directors do not manage the affairs and business of the bank according to the charter and by-laws, and use ordinary diligence to supervise the conduct of their office and to understand the condition of the bank, and loss ensues, they are liable for all losses their misconduct may inflict either upon stockholders or creditors: 1 *Morse on Banks and Banking*, sec. 138; 17 *Am. & Eng. Ency. of Law*, 109, and cases cited. They are trustees for depositors and can be held liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is, in fact insolvent: 1 *Morse on Banks and Banking*, sec. 130a. We adopt what is so well and forcibly said in *Delano v. Case*, 121 Ill. 247, 2 *Am. St. Rep.* 81: "Ordinarily, the character of the directory for integrity and business capacity increases the degree of confidence reposed in the corporation by the public. Were depositors, when intrusting to a bank their entire fortune, to be informed that the directors, upon whose honor and careful watchfulness ³¹⁹ they were relying, owed them no duty, were under no obligation to take at least reasonable precautions to guard their money from the itching fingers of dishonorable officials, they would certainly hesitate

long before surrendering it upon such terms." For false statements of the condition of the bank, published by authority of the directors, when they knew of the falsity, or with reasonable care might have known it, the directors are personally liable: 1 Morse on Banks and Banking, sec. 132, and cases cited; Bolles on Banks, sec. 4; *Shea v. Mabry*, 1 Lea, 319; *Townsend v. Williams*, 117 N. C. 330. "While directors are bound to exercise ordinary skill, and are liable for losses resulting from mismanagement of the affairs and business of the bank, they are not liable for excusable mistakes concerning the law and for errors in judgment, either as to the law or the management, when acting in good faith" (2 Am. & Eng. Ency. of Law, 115, and cases cited), though good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees: *Shea v. Mabry*, 1 Lea, 319; *Townsend v. Williams*, 117 N. C. 330. The degree of care required of directors depends upon the subject to which it is to be applied. They are not insurers of the fidelity of the agents whom they appoint, nor are they responsible for losses caused by the wrongful acts of such agents, unless there was gross negligence in making such appointment, or in lack of proper supervision: 3 Thompson on Corporations, secs. 4106, 4113; *Briggs v. Spaulding*, 141 U. S. 132; *Paine on Banking Laws*, sec. 1781, subd. 2.

Where the object of the suit is to charge the directors with liability for a breach of trust, the rule is well settled that relief may be had against any or all those who concurred in the wrong, the tort being treated as several as well as joint: 4 Thompson on Corporations, sec. 4582, and cases ³²⁰ cited. The liability of the president and vice-president to depositors and other creditors for losses sustained by them in dealing with the corporation on the faith of misrepresentations by such officers as to its financial condition, or other facts forming a material inducement to the deposit or contract, is the same as that of directors: 4 Thompson on Corporations, secs. 4670, 4671, 4672, and cases cited. While it is quite well settled that an action can be brought against the directors by the depositors and other creditors for damages caused by their gross mismanagement, neglect, and false representations, and this without first applying to the corporation itself, or to the receiver, to bring such action, there have been authorities that a stockholder could not maintain such action without such prior demand and refusal, but it is made clear that this was only at law, and that in equity, upon proper al-

legations, a stockholder, as well as a creditor, may now maintain the action directly and in the first instance against the directors; 3 Thompson on Corporations, sec. 4090; 2 Morse on Banks and Banking, sec. 717. But both as to third parties and stockholders alike, it is a good cause of action against directors that they declare the dividend, as in this case, out of the capital stock or deposits of the bank, and not out of its earnings: 2 Morse on Banks and Banking, sec. 717; Gaffney v. Colvill, 6 Hill, 567; and also that they caused false reports to be published by the directors of the condition of the bank. As said above, it is not necessary that the directors should know that such reports are false. It is their duty to know that they are true: Huntington v. Att-rill, 118 N. Y. 365; 42 Hun, 459; 3 Thompson on Corporations, sec. 4224; Hauser v. Tate, 85 N. C. 81; 39 Am. Rep. 689; citing German Sav. Bank v. Wulfekuhler, 19 Kan. 60; Bank of St. Marys v. St. John, 25 Ala. 566; United Soc. v. Underwood, 9 Bush, 609; 15 Am. Rep. 731.

No error.

THE LIABILITY OF BANK DIRECTORS FOR THE LOSS OF A DEPOSIT is shown in Tate v. Bates, 118 N. C. 287; ante, p. 719 and notes thereto. In addition to what is there stated, it may be said that the directors of a corporation are supposed to know the facts touching its condition and property, and that their statements in respect to its affairs naturally attract public confidence. Hence, if they fraudulently unite in an attempt to deceive the public, and by false statements of facts to give credit and currency to its stock, they are justly liable to answer to those who have been deluded into giving confidence to them. It is not necessary, in order to recover of a corporation for injury caused by the false and fraudulent representations of its directors as to the affairs of the corporation, that there should have been an intention to defraud the plaintiff in particular. If the design is to defraud the public generally, any person who suffered injury thereby may maintain his action: See monographic note to Seale v. Baker, 8 Am. St. Rep. 604, on the liability of directors of a corporation for misrepresentations of its solvency, and to Hodges v. New England Screw Co., 53 Am. Dec. 649, on the liabilities of the directors of corporations. The directors of a bank must exercise ordinary care and diligence, and are answerable for losses resulting from mismanagement of its business affairs: Marshall v. Farmers' etc. Sav. Bank, 85 Va. 676; 17 Am. St. Rep. 84, and monographic note thereto on the liability of the directors of a corporation for negligence; though some cases hold that they are liable only for gross negligence in the management of the affairs of the bank: Note to Swentzel v. Penn Bank, 30 Am. St. Rep. 725; monographic note to Marshall v. Farmers' etc. Sav. Bank, 17 Am. St. Rep. 98, showing what is meant by "gross negligence." A depositor in a bank may recover from its directors for damages resulting to him from negligence in permitting it to be held out to the public as solvent, when it was insolvent: Delano v. Case, 121 Ill. 247; 2 Am. St. Rep. 81; Seale v. Baker, 70 Tex. 283; 8 Am. St. Rep. 592, and note; Tate v. Bates, 118 N. C. 287; ante, p. 719; Note to Hodges v. New England Screw Co., 53 Am. Dec. 649. The circumstances under

which directors may be regarded as guilty of actionable negligence in the management of the corporate business are treated in the note to *Marshall v. Farmers' etc. Sav. Bank*, 17 Am. St. Rep. 95-101. The conclusion there reached was, that their liability could not be enforced by a creditor of the corporation, unless it appeared that the corporation itself would not act: See monographic note to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 928, on the personal liability of officers of corporations to third persons. A bank is liable for the defaults of its immediate servants or agents: See monographic note to *Isham v. Post*, 38 Am. St. Rep. 775, on the care required of bankers acting as agents or bailees. If several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform it, or for performing it negligently: *Wisconsin R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49.

COWAN v. FAIRBROTHER.

[118 NORTH CAROLINA, 406.]

CONTRACTS—RESTRAINT OF TRADE.—A SALE OF THE RIGHT TO COMPETE in a particular business or calling is valid and enforceable, if the rights of the public are not affected by restraining trade.

CONTRACTS TO FORBEAR FROM COMPETITION—CHANGE OF LAW.—The older cases attempting to fix arbitrary geographical bounds beyond which a contract to forbear from competition would not be enforced, have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed.

CONTRACT NOT TO PRINT NEWSPAPER, VALIDITY OF—RESTRAINT OF TRADE—INJUNCTION.—The sale of a newspaper, by its editor and owner, with a covenant, on his part, not to edit, print, conduct, or be in any manner connected with, a newspaper published within the state for a specified period, is a contract not affecting the public, and is not invalid as being in restraint of trade, or as being in contravention of a constitutional provision guaranteeing the freedom of the press. The breach of such a contract may be restrained by injunction.

CONTRACTS—SALE OF RIGHT TO COMPETE—TRANSFER—INJUNCTION.—The purchaser of a right to compete for popularity as an editor may lawfully sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the buyer will be protected by injunction.

CONTRACTS IN RESTRAINT OF TRADE—ENFORCEMENT—INJUNCTION.—Such contracts in restraint of trade as are valid may be enforced in equity, like other contracts, and breaches of them will be restrained by injunction, on the ground that no other remedy is adequate.

SALES—FRAUD—PURCHASE BY AGENT FOR UNDISCLOSED PRINCIPAL.—Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take the title in his own name, as an agent's concealment of the fact that he is buying for another is not per se a fraudulent act.

SALES—RESCISSION—FRAUD—PUTTING IN STATU QUO.—A vendor, who seeks to have a contract of sale set aside upon the ground of fraud, must offer to return the purchase money in order to put the purchaser in statu quo.

CONSTITUTIONAL LAW.—FREEDOM OF THE PRESS—SALE OF EDITOR'S TALENTS.—A constitutional guaranty of freedom of the press does not restrict the right to sell anything of value, such as the creature of an editor's brain, provided society is not made to suffer by the transaction.

Action for an injunction. On December 29, 1893, the defendants, Al Fairbrother and Mrs. M. H. Fairbrother, his wife, being then the owners and editors of the Durham Daily Globe and the Durham Weekly Globe, and of other property connected with and necessary to their publication, and being then engaged in publishing the same, made and executed, with J. W. Jenkins, in consideration of thirty-five hundred dollars, a bill of sale, transferring to Jenkins the two newspapers, and property connected with their publication, including subscription-books and lists, together with office furniture, etc. The goodwill of the newspapers and the business of conducting them was also transferred, and the Fairbrothers bound themselves, for a period of ten years, not to edit, print, or conduct a newspaper or magazine, as shown by the stipulation in the opinion. There was a warranty of the right to convey. The price paid was far more than the value of the tangible property, and the inducement for paying so great a price was the agreement of the defendants not to edit, print, or conduct a newspaper or magazine, as above stated. On December 30, 1893, Jenkins transferred the contract, and the property therein described, to G. W. Watts, who, on July 25, 1894, transferred a half interest in the same to B. N. Duke. On July 29, 1895, Watts and Duke leased the property to the plaintiff. It was alleged that the defendants had purchased, or contracted to purchase, the Durham Recorder, a newspaper published in the town and county of Durham, state of North Carolina, and had assumed the charge and management thereof, and would, on July 1, 1895, edit, print, and conduct a newspaper or magazine in the county of Durham, or be, in some way, connected with a newspaper or magazine therein published, without the consent of Jenkins, or his assignees, and in violation of their contract. It was set up by Al Fairbrother, in defense, that the publication of the newspapers referred to in the contract had been, in effect, abandoned by Jenkins and his assignees before the defendant entered into any arrangements for taking charge of, and managing, the publication of a newspaper in Durham; that the plaintiff knew of the defendant's intention to connect himself with a newspaper in Durham before he, the plaintiff, took any lease from Watts and Duke; that Watts was hostile in feelings toward the defendant before the execution of the con-

tract between the defendants and Jenkins, and procured Jenkins to enter into the contract with the defendants; that this was done with the fraudulent intent to deceive the defendants by representing that Jenkins was buying for himself, whereas, in fact, he was acting as the agent of Watts, and that both Watts and Jenkins knew at the time that the defendants would not, if they knew it, have entertained any proposition coming from Watts. The defendant also contended that the contract was void because it tended to restrict the freedom of the press, and because it was in restraint of trade and contrary to public policy. The temporary restraining order as to Mrs. M. H. Fairbrother was vacated, as she disclaimed any intention of violating her contract; but, upon the plaintiffs' giving a bond, the defendant, Al Fairbrother, was restrained, enjoined, and forbidden to edit, print, or to be in any way connected with, any newspaper or magazine published in the state of North Carolina, until the final hearing of the cause, which was retained for further orders, and he appealed.

William A. Guthrie, for the appellant.

Fuller, Winston & Fuller, Boone, Merritt & Bryant, and Shepherd, Manning & Foushee, for the appellee.

411 AVERY, J. Where a person acquires a reputation for skill and learning in his profession as a lawyer or a physician, he often creates an intangible but valuable property by winning the confidence of his patrons and securing immunity from successful competition for their business. So, where an editor, by reason of his style, his power, his pathos, his humor, his learning, or of any gift or attainment, attracts subscribers solely by such personal qualities, he imparts a peculiar value to the goodwill and property of a newspaper which goes with him, to its injury, when he leaves it and lends the talent and accomplishments that have given it patronage and popularity to a rival journal in the same vicinity. Where he owns the press and plant, the enhanced value so imparted by him becomes an element of his property, with the same incidental power to dispose of it as attaches to any other of his acquisitions which has a market value: *Beal v. Chase*, 31 Mich. 529. But it is not like other property which ordinarily passes by delivery or assignment to the purchaser. Neither an editor, a lawyer, or a physician can transfer to another his style, his learning, or his manners. Fither, however, can add to the chances of success and profit of another who embarks in the same business in the same field by withdrawing as a competitor.

So that the one sells and the other buys something valuable, and the policy of the law limits the right to enter into such contracts of sale ⁴¹² only to the extent that they are held to injure the public by restraining trade. The one sells his prospective patronage, and the other buys the right to compete with all others for it and to be protected against competition from his vendor. The law intends that the one shall have the lawful authority to dispose of his right to compete, but restricts his power of disposition territorially so as to make it only coextensive with the right to protection on the part of the purchaser. To the extent that the contract covers territory from which the vendor has derived, and will probably in future derive, no profit or patronage, it needlessly deprives the public of the benefit of open competition in useful business and of the services of him who sells without any possible advantage to his successor. When the reason upon which a law is founded ceases, the rule itself ceases to operate. The older cases in which the courts attempted to fix arbitrarily geographical bounds beyond which a contract to forbear from competition would not be enforced have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed: *Nordenfelt v. Maxim etc. Co.*, L. R. App. Cas. [1894] 535; *Hitchcock v. Cocken*, 6 Ad. & E. 106; *Herreshoff v. Boutineau*, 17 R. I. 3; 33 Am. St. Rep. 850; *National Ben. Co. v. Union Hospital Co.*, 45 Minn. 272; *Beal v. Chase*, 31 Mich. 490; *Tallis v. Tallis*, 1 El. & B. 391; *Oregon etc. Co. v. Winsor*, 20 Wall. 64; 10 Am. & Eng. Ency. of Law, 947, note; 3 Am. & Eng. Ency. of Law, 885, note; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396.

Where the nature of the business was such that complete protection could not be otherwise afforded, the restraint upon the right to compete has been held good in one or ⁴¹³ more instances where it extended throughout the world, and in other cases where it applied to a state or to a boundary including several states.

In *Nordenfelt v. Maxim etc. Co.*, L. R. App. Cas. [1894] 535; the plaintiff had covenanted with the respondent company, "not to engage, except on behalf of such company, either directly or indirectly, in the trade or business of a manufacturer of guns or ammunition, or in any business competing, or liable to compete in any way with that carried on by such company." On appeal to the house of lords the case of *Horner v. Graves*, 7 Bing. 743, was cited, and the validity of such contracts was declared to depend upon the question "whether the restraint is such only as to af-

ford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." Lord Herschell, L. C., said further: "Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable. The tendency in later cases has certainly been to allow a restriction in point of space, which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of one hundred and fifty or even two hundred miles has not been held to be too much in some cases. For the same reason, I think a restriction applying to the entire kingdom may, in some cases, be requisite and justifiable."

In *Beal v. Chase*, 31 Mich. 530, Judge Campbell quotes with approval the language of Chief Justice Chapman in *Morse etc. Co. v. Morse*, 103 Mass. 77, 4 Am. Rep. 513, where he said: "In this country, there are periodical publications that have a very wide circulation, and it is obvious that a purchaser of the proprietorship cannot afford to pay the full value unless he can obtain from the vendor a valid restriction against ⁴¹⁴ competition, which restriction shall be as extensive as the interest requires, though it may cover the whole of a state or the whole of a country. The same would be true as to some books. For example, the author of a popular school-book could not sell its proprietorship for its full value unless he could bind himself not to prepare another book which should be used in competition with it."

The rule which concedes the right to make the area in which the vendor is to be restricted from competition as broad as is necessary to afford ample protection to the purchaser is subject to the qualification that no agreement will be upheld which is injurious to the public interest: *Nordenfelt v. Maxim etc. Co.*, L. R. App. Cas. 549. There are two familiar classes of contracts that will in no event be enforced, because contrary to public policy, and these constitute exceptions to the general rule governing sales of the right of competition: 1. A quasi public corporation cannot disable itself by contract from performing the public duties which it has undertaken to discharge in consideration of the privileges granted to it: *Logan v. North Carolina R. R. Co.*, 116 N. C. 940; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 410; 2. Any agreement in contravention of the common or statute law generally, or any combination "among those engaged in a business impressed with a public or quasi public character which is manifestly prejudicial to the public interest, is void as against

public policy, and, upon the same principle, no agreement tending to create a monopoly or designed to utterly destroy fair competition amongst public carriers will be enforced": *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 21 Am. St. Rep. 819, and note; *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258.

But the contract, of which the plaintiff claims the benefit as assignee through John Jenkins, is one which in no ⁴¹⁵ way affects the public, unless it unreasonably deprives the people of the state of the benefit of the industry of the defendants, or unnecessarily precludes them from supporting their family by pursuing their occupation: *Oregon Nav. Co. v. Windsor*, 20 Wall. 68. The stipulation was, that the defendant Fairbrother, "would not edit, print, or conduct a newspaper, nor be in anywise connected with one printed anywhere in the state of North Carolina, and that for a like period Mrs. Fairbrother shall not edit, print, or conduct a newspaper or magazine, nor be in anywise connected with one anywhere in the county of Durham, said state, without the consent of said purchaser or his assignees." This contract was assigned to Watts and Duke by Jenkins, and the assignees, who own the property, have leased to the plaintiff Cowan, who is now publishing the *Globe* newspaper, and seeks to enjoin the defendant, Al Fairbrother and the other defendant from publishing another newspaper in Durham, as it is conceded they propose to do if the court should not interfere. Since the use of steam, space has been in a measure annihilated, and it is a fact, of which the courts may take notice, that a newspaper may be carried by mail to the most remote parts of the state within from twenty-four to forty-eight hours. So that, if there has ever been a time in the history of the state when an editor could not acquire a reputation for excellence in some particular line of that business, which would enable him to give a paper with which he might be connected popularly throughout its limits, there is no reason to doubt now that one, who would rid himself of a competitor in that business, is not describing an unreasonable boundary when he extends the restriction against competition to the state lines. No better proof of that fact could be adduced than is set forth in the uncontradicted affidavits of the defendants themselves, that they injured their ⁴¹⁶ successor, John Jenkins, in the conduct of the *Durham Globe*, after the contract was entered into, by publishing a paper in Lynchburg, Virginia. If the right to compete for popularity as an editor may become valuable and pass by a contract of sale, like the goodwill of a news-

paper, it follows necessarily as a logical sequence that the purchaser may sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the transaction would be held valid for the same reason that renders the original sale enforceable: 3 Am. & Eng. Ency. of Law, 885, and note, with authorities collected; *Beal v. Chase*, 31 Mich. 490; *Perkins v. Clay*, 54 N. H. 518; *Hedge v. Lowe*, 47 Iowa, 137; *Gompers v. Rochester*, 56 Pa. St. 194. It is settled law that such contracts, in restraint of trade, as are valid, may be enforced in equity, like other contracts, and that breaches of them will be restrained by injunction, on the ground that no other remedy is adequate: 3 Am. & Eng. Ency. of Law, 885, and note; *Thompson v. Andrus*, 73 Mich. 557. A covenant on the part of a publisher not to publish a paper is considered in the same light as a contract to sell a particular business or the right to practice a profession in a given area, and courts of equity will interpose in order to prevent a violation of the one as well as of the other: 10 Am. & Eng. Ency. of Law, 947; note.

The plaintiff's lessors swear that they had never abandoned at any time the purpose to continue the publication of the newspaper, and that during the suspension they kept up continual negotiations with that end in view. They say further that the suspension was prolonged by giving an option to one with whom they had good reason to expect they might conclude a contract to again issue it regularly.

A review of all the cases, where it has been held that ⁴¹⁷ parties have abandoned rights, will furnish no analogy to support the contention that the benefit of a contract, like that which is the subject of the action, must be deemed in law abandoned for failure to find a suitable editor for so short a time, especially where it appeared that reasonably diligent efforts were being made to have the business continued. The concealment by Jenkins of the fact that he was buying for another was not per se a fraudulent act, and there is no allegation on the part of defendants that he practiced any fraud upon them. Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take title in his own name. If the defendants had set up a state of facts which in law amounted to a fraud, and had asked the court to rescind the contract upon the principle that he who asks equity must do equity, they would have been required to offer to return the money received. In order to avail themselves of that remedy, they should have brought suit to set aside the agreement upon the discovery of the fraud, if

there was fraud, and should have offered to place the purchasers in statu quo: *California Steam Nav. Co. v. Wright*, 8 Cal. 585, 592.

It is contended for defendants that the contract is illegal and void because it is in contravention of the provision of the constitution (Const., art. 1, sec. 20), which guarantees the freedom of the press. When the framers of our constitution declared that the freedom of the press was one of the bulwarks of liberty, and therefore ought never to be restrained, but that every individual should be held responsible for the abuse of the same, they entertained no purpose to restrict the power of any person to dispose of anything of value, which, as the creature of his own mental or physical exertions, had become his property. This right is as much a fundamental one as is that to use the press without violation of reasonable laws intended to ⁴¹⁸ protect others from libel and slander. In its broadest sense, freedom of the press includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion: *Black's Constitutional Law*, 472, 473; *Cooley's Constitutional Limitations*, 517, 518; *Ordinaux Constitutional Legislation*, 236, et seq; *3 Story on the Constitution*, 731. An indefinite number of authorities might be cited to show the universal interpretation placed upon the provision in the constitution of the United States that the freedom of the press shall not be abridged, and upon similar clauses in state constitutions. It has never been held anywhere that these provisions could be made engines of oppression by construing them as restrictions upon the right to sell anything of value, that is the creature of one's brain, provided society would not be made to suffer by the transaction. Upon a review of all the assignments, we discover no error in the rulings below, and the judgment is therefore affirmed.

Affirmed.

CONTRACTS IN RESTRAINT OF TRADE are not necessarily void by reason of universality of time or of place. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness in contracts of this kind is the test of their validity: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784, and note showing that an agreement in restraint of trade is not necessarily void on the ground of public policy because it extends throughout the state, as some businesses require a limit of larger range than others: Compare note to *Chapin v. Brown*, 32 Am. St. Rep. 301. A contract in restraint of trade, if inimical to the public interest, is void: *Consumers' Oil Co. v. Nunemaker*, 142 Ind. 560; 51 Am. St. Rep. 193. But a contract, not to

carry on a trade or business in a particular place for a given time, being only in partial restraint of trade, is valid: *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297, and note. One engaged in business may sell his stock in trade and goodwill and make a valid contract with the purchaser that he will not engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract: Note to *Dills v. Doeblor*, 36 Am. St. Rep. 349; *Moore Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23. The extent of territory is not the sole test by which to determine the reasonableness of restraint of trade. The effect of such restraint upon the interest of the public is a better test: *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; note to *Oakdale Mfg. Co. v. Garst*, 49 Am. St. Rep. 789.

SALES—FRAUD—RESCISSION.—One party to a sale or other contract cannot rescind without placing, or offering to place the other party in statu quo: Note to *Arnold v. Hagerman*, 14 Am. St. Rep. 724.

MILLER v. LIFE INSURANCE CO.

[118 NORTH CAROLINA, 612.]

USURY.—AN USURIOUS TRANSACTION is one in which it is intentionally provided that a party may take more than the lawful rate of interest for the loan of money.

USURY—DOCTRINE UPON WHICH IT RESTS.—If it is the intent or purpose of the lender of money to get more than the lawful rate of interest, and there is a provision, a condition, or a contingency in, or connected with, the contract of loan, by which he may do so, the contract is usurious.

USURY.—A CONTRACT IS USURIOUS when it is the purpose of the lender to get more than the lawful rate of interest, and there is any contingency by which he may do so, whether it is so apparent that it becomes the duty of the court so to declare, or whether it is a case in which it is necessary that the jury should find the facts.

USURY—DEPENDS UPON WHAT.—The question of usury does not depend upon the question whether the lender actually gets more than the legal rate of interest or not; but does depend upon whether there was a purpose in the mind of the lender to make more than legal interest for the use of money, and whether, by the terms of the transaction, and the means used to effect the loan, he may, by its enforcement, be enabled to get more than the legal rate. If so, the transaction is usurious.

USURY—"CHANCE OF ADVANTAGE."—A stipulation in a contract of loan even for a "chance of advantage" beyond legal interest, is illegal, and courts will not enforce the contract.

USURY—WHEN A QUESTION OF LAW.—An agreement which, in legal effect, gives to the lender of money any profit or advantage, certain or contingent, more than the legal rate, is usurious upon its face, and the court must so declare as a matter of law.

USURY—WHEN A QUESTION OF FACT.—If the true character of a transaction is equivocal, and its usurious character is not manifest but depends upon facts and circumstances connected with the transaction, as a part of the *res gestae*, it then becomes a question of fact as well as of law, and must be submitted to the jury.

USURY—LIFE POLICY OF INSURANCE AS CONDITION PRECEDENT TO LOAN—GENERAL RULE.—If a borrower, as a condition of receiving a loan, is required to take a policy of life insurance from the lender, and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, it is generally held that the profit thus derived by the lender is equivalent to additional interest, and therefore usurious.

USURY—POLICY OF LIFE INSURANCE—ASSIGNMENT—ILLUSTRATION.—If a life insurance company lends a sum of money to a borrower at the full legal rate of interest, payable monthly, upon abundant security by way of mortgage upon real estate, but, in addition to, and as a condition of, the loan, requires the borrower to take out and assign to it an endowment policy for a sum equal to the amount of the loan, upon which the premiums must be paid monthly for seven years, or until the borrower's death, and the payment of which premiums is also secured by the mortgage, thus affording the company the "chance" to make several hundred dollars in addition to the legal rate of interest, the transaction is usurious upon its face, and a court will so declare.

Action for an accounting and to enjoin and restrain the defendant from selling the lands of the plaintiff under a deed of trust. A temporary restraining order and order to show cause was granted. The plaintiff, Miller, desired to borrow \$1,200 from the defendant insurance company. The loan was made on October 1, 1895, and to secure its repayment the plaintiff conveyed certain lands by a mortgage or trust deed, with power of sale upon default. He, at the same time, executed to the defendant his bond in the penal sum of \$2,400, conditioned for the repayment of said loan in seven years from its date, with interest during said period at the rate of six per cent per annum, payable monthly, and further conditioned for the payment of \$15.12 monthly, during said period, as monthly premium on an endowment or policy. The endowment or policy was for \$1,200 and was issued simultaneously with the granting of the loan, and was on the same day assigned in writing to the defendant by the plaintiff to secure the performance of the penal bond. Prior to January 27, 1896, the plaintiff paid to the defendant the sum of \$21.12 on account of his indebtedness, and on that date tendered to the defendant the sum of \$1,203, in gold coin, in payment of his indebtedness, and demanded the cancellation of the deed of trust, and the surrender of the bond, which the defendant refused, and the land described in the deed of trust was thereafter advertised to be sold under foreclosure. At the time the plaintiff applied for his loan, the defendant informed him that it used its money to increase its insurance business, and that it would make the loan, if he would secure the same by trust deed upon good real estate, and would take out a policy in defendants' com-

pany for the sum of \$1,200, and assign the same to the defendant as additional security for the loan. This the plaintiff agreed to do, and did do. The plaintiff, when this action was brought, was still ready and willing to pay the sum of \$1,203, as tendered, that being the amount of the loan, with interest thereon at the rate of six per cent per annum, payable monthly, but was unwilling and refused to pay the premiums due on the endowment or policy of \$15.12 per month, claiming that the contract was usurious, and that the whole contract was a building and loan contract, and not such a contract as comes within the scope or powers recognized in law as appertaining to life insurance companies. It was agreed that the contract was not usurious, except as it might be construed by the court to be so after considering the papers constituting it; but the plaintiff contended that, on its face, the contract was usurious, and that the defendant was only entitled to recover the principal of the loan, with interest at six per cent per annum; and the defendant contended that the endowment or policy was a separate legal contract, based upon a valuable consideration, and that the plaintiff was indebted to the defendant, on January 27, 1896, in addition to the interest on the loan, and the principal thereof as tendered, the sum of \$30.24 premiums on the endowment policy. The defendant denied that the contract, or any part of it, was usurious; and contended that it was not a building and loan contract, nor such a contract as building and loan companies issue, but that it was one that life insurance companies have a right to make, and one that belonged strictly to life insurance. On the return day of the preliminary injunction the court ordered that the injunction should be continued until the final hearing, at which time, a jury trial being waived, in open court, it was settled and agreed that the rights of the parties should be determined by the facts as above set forth; and the court adjudged that the contract, on its face, was not usurious, and ordered the injunction to be dissolved, leaving the defendant to proceed according to the methods set out in the contract. From this judgment the plaintiff appealed.

T. F. Kluttz, for the appellant.

MacRae & Day and John A. Coke, for the appellee.

616 FURCHES, J. The papers referred to in the case agreed and made a part of the case on appeal show, in addition to the facts set forth in the agreed case, that the property conveyed in the deed of trust to Overman and McCubbins was a town lot worth about \$1,000 without the improvements, and improve-

ments on it worth about \$1,500. And among the conditions are these requirements: That the plaintiff shall keep the buildings constantly insured in some good fire insurance company, to be approved by defendant, and for defendant's benefit, for at least the sum of \$1,200, which policy is also to be assigned to defendant; that plaintiff pay the \$1,200 when due, and that he also pay the interest on the note on the last of each month, ⁶¹⁷ and that he pay the installments of \$15.12 due on the life policy of \$1,200 on the last of each month for seven years. And if plaintiff shall fail in doing and performing any one of these conditions, it constitutes a breach, for which the trustees shall foreclose by sale; "and payment of said principal sum and all interest thereon, together with all monthly payments and fines on said endowment policy, and all costs and disbursements arising under this trust, including all taxes, assessments, insurance, or other sums that may have been paid by said company as herein provided, may be enforced and recovered at once by sale, foreclosure, or otherwise, anything herein contained to the contrary notwithstanding."

"It is further stipulated and agreed that all the conditions of the said endowment policy are made part of this deed, as covenants of the parties of the first part."

It is admitted that it is lawful to loan money in this state at six per cent and no matter what amount of security is required, if it is only for the purpose of securing the repayment of the principal and six per cent interest thereon. It is also admitted that it is lawful to issue life insurance policies, such as that issued in this case; and defendant contends that it is impossible to take two transactions that are lawful within themselves and make an unlawful transaction out of them, when combined into one transaction.

This fairly presents the question before us, and is a strong presentation of defendant's side of the case. But when it comes to be tested by the weight of authority, and we think by the reason of the thing, it cannot stand the test. It is perfectly lawful, as admitted by all, to loan money at six per cent and to require any security for its repayment, with this lawful interest. It is entirely lawful for A to secure by mortgage the insolvent note of B as a ⁶¹⁸ separate and distinct transaction. But if A applies to C for the loan of \$1,000, and C agrees to lend the money to A if he will include in the note to him the insolvent note of B, and A agrees to this, and secures the insolvent note, the note thus made, including the money loaned and the insolvent note of B, is held to be usurious: *Shober v. Hauser*, 4 Dev. & B. 91; *McKesson v. Mc-*

Dowell, 4 Dev. & B. 120. The true rule is, whether there was an intent—a purpose—on the part of the lender to get more than the lawful rate of interest by the transaction. If there was, and by means of the transaction he may do so, the law pronounces it an unlawful and corrupt contract, and usurious. But if this is not manifest from the transaction, but depends upon facts and circumstances connected with the transaction, as a part of the *res gestae*, it then becomes a question of fact, as well as of law, and must be submitted to the jury. In the case of *Shober v. Hauser*, 4 Dev. & B. 91, where it was doubtful whether the note of B was not collectible at the date of the loan, and other circumstances therein mentioned, which, if found as plaintiff contended, would have rebutted the allegation that there was a usurious purpose on C's part, in requiring that B's note should be included, it was held to be a case for the jury. And so was the case of *McKesson v. McDowell*, 4 Dev. & B. 120. The court held that the question as to whether the small discount made was truly in consideration of the services of the assignee, as stated and contended by plaintiff, or whether that was a cloak and a device to cover the real transaction and to get more than lawful interest on the money, were questions of fact, and should have been submitted to the jury with proper instructions.

But these cases hold the true rule to be this: Was it the purpose of the lender to get more than the lawful rate of interest, and was there any contingency by which he might ⁶¹⁹ do so? If there was, the transaction is usurious, whether it is so apparent that it becomes the duty of the court so to declare, or whether it is a case in which it is necessary that the jury should find the facts. These cases seem to decide the principle upon which the doctrine of usury rests. That if it is the purpose of the lender to get more than the lawful rate of interest for loan of money, and if there be a provision, a condition, a contingency, in or connected with the contract by which he may do so, it is usurious.

We intend to be governed by the rule, as we understand it to be laid down by this court in *Shober v. Hauser*, 4 Dev. & B. 91, and *McKesson v. McDowell*, 4 Dev. & B. 120. In our investigation, we find much authority sustaining this rule and applying these principles to the case before us.

“Where, as a condition of making a loan, the borrower is required to take policies of life insurance from the lender and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, it is generally held that the profit thus derived by the lender is equivalent to additional interest, and

therefore usurious": 27 Am. & Eng. Ency. of Law, sec. 29, p. 1021, and note 1.

"All agreements, which in legal effect give to the lender of money any profit or advantage, certain or contingent, more than at the rate of seven [here six] per cent interest, violate the statute. It is not necessary to allege or prove aliunde any peculiar intent or special corruption in such a case. It is usury upon its face and the court must so declare as a matter of law. It is only when the true character of the transaction is equivocal, . . . a device for usury, that the question becomes one of fact and belongs to the jury": *Thomas v. Murry*, 34 Barb. 171.

Where the lender takes the chance for more than legal interest, "this contingent benefit beyond the legal rate ⁶²⁰ of interest, and where the lender has the right to demand the repayment of the principal sum with the legal interest thereon, in any event, the contract is in violation of the statute prohibiting usury": *Browne v. Vredenburg*, 43 N. Y. 197.

"A stipulation even for a chance of advantage beyond legal interest is illegal, and courts will not lend their aid to enforce an unlawful contract": *Butterick v. Harris*, 1 Biss. 443.

"The two transactions were combined into one—the loan would not have been made but for the insurance—six per cent, the full limit of interest, was charged for the money. But the loan depended upon the borrower's taking the policy of insurance. The policy was a thing of value to the plaintiff [here defendant], or it would not have required it to be taken as a condition precedent to the loan, and is usurious": *Missouri Valley Life Ins. Co. v. Kittle*, 2 Fed. Rep. 116.

In our investigation of this important question, we believe we may say that we have found no case or other authority that does not sustain the principle, announced by this court, that a usurious transaction is one in which it is intentionally provided that a party may take more than the lawful rate of interest for the loan of money. But we have found cases that differ as to the application of this principle; we have found a few cases which hold that it does not per se make a transaction usurious for a life insurance company to require a party wishing to borrow money to take out a policy of insurance as a condition precedent to the loan: *Washington Life Ins. Co. v. Paterson Silk Mfg. Co.*, 25 N. J. Eq. 160; *Homeopathic Mut. Life Ins. Co. v. Crane*, 25 N. J. Eq. 418. But none of them dispute the principle here laid down or decide that it would not be usurious if so intended, and the great weight of authorities is to the effect that it is usurious per se.

⁶²¹ Having ascertained the principle upon which our judgment should be founded, it yet remains to make the application to the facts of this case—a thing, in many cases, more difficult to do than to find and define the principle of law that should govern the case. If we take the cases cited from 34 Barbour, 43 New York, 2 Federal Reporter, and add to these that in 27 American and English Encyclopedia of Law as authority, the question would seem to be settled, and it would only remain for us to declare the transaction usurious. But as there is some diversity of authority as to the application of this admitted principle, it seems proper that we should, to some extent, examine the question of applying the facts of this case. We cannot conceive of a case where the money loaned by the defendant to the plaintiff Miller could have been better secured than it was, without the assignment of the insurance policy.

The defendant had a deed in trust, made to its own selected trustees, on real estate worth \$2,500, with the improvements, and \$1,000 without any improvements, with a condition in the trust deed that the plaintiff at all times should keep the buildings on this lot insured to the amount of \$1,200 in a good fire insurance company, to be selected or approved by defendant, and this policy should also be assigned to the defendant; that the plaintiff should pay all taxes, fines, and assessments that should be levied, assessed, or placed upon said property, and a failure on the part of plaintiff to keep and perform any of these conditions or requirements should amount to a breach, and the trustees should proceed at once to sell and apply the money. This being so, there can be no claim or pretense, but that the money loaned (\$1,200) was abundantly secured. But this was not all the conditions this remarkable deed contained. It is ⁶²² further provided, as additional conditions, that plaintiff shall assign to the defendant the \$1,200 life insurance policy he had been compelled to take out, and the payment of \$15.12 to the defendant each month on this policy is secured to defendant, as one of the conditions in this deed of trust, for the term of seven years. And it was stated and admitted on the argument that plaintiff did not wish to take out this policy, and would not have done so but for its enabling him to borrow the money. And it is proper to state that it was stated by counsel of defendant and admitted by counsel of plaintiff that the premiums charged on this policy were the usual charges on such policies.

Then, when the \$1,200 loaned to plaintiff was amply and abundantly secured, and every dollar to be repaid with lawful interest,

the payment of which did not, and does not, depend upon the insurance policy, why was it that defendant made the insurance a condition precedent upon which it would loan the money.

It was admitted on the argument that if the plaintiff, Miller, should live out the seven years, the defendant would make seventy dollars by the insurance. And, if we adopt the rule laid down in the cases cited to sustain plaintiff's contention that a contingent benefit over and above lawful interest taints the transaction with usury, this admission is sufficient to decide the case. But it does not seem to us that this admission reaches the truth of this transaction, as defendant has a bond that falls due seven years after date, and an insurance policy due in seven years, upon which \$15.12 falls due every month, and the payment of this interest and this \$15.12 per month is secured by a deed of trust. It is not clear whether this interest and these premiums end at the death of Miller or not. But suppose they do, and we do not put our judgment ⁶²³ upon this speculation as to whether they end at Miller's death or not—as it is not clear to us how this is. But taking it that it does, it is then clear to our minds that the admissions as to the profits made by the defendant do not reach the truth. It is true that if we take seven years and divide them into months we have eighty-four months, and \$15.12 per month makes \$1,270. But in this calculation there is no notice taken of the fact that defendant has no money invested in the policy of insurance, nothing but the risk of Miller's dying, and that Miller has been paying into its treasury \$15.12 every month from the date of the policy to the end of the seven years. If the interest is calculated on these premiums from the date of their payment to the end of the seven years at six per cent, with the \$70 added, it will be found that defendant has made out of the insurance about \$300 and the plaintiff has lost this amount, supposing he gets \$1,200 at the end of the seven years. We say supposing he gets back \$1,200 at the end of the seven years, for he is the creditor in that part of the contract, and, like all creditors, takes the risk of getting his money back—be this risk much or little.

But the question of usury does not depend upon the question whether the lender actually gets more than the legal rate of interest or not. If this were so, it could never be determined whether there was usury or not until the money was paid back. This would be like locking the stable after the horse was stolen. But it depends upon whether there was a purpose in the mind of the lender to make more than legal interest for the use of money, and whether, by the terms of the transaction and the

means used to effect the loan, he may by its enforcement be enabled to get more than the legal rate. If so, the transaction is usurious.

624 In this case, the proposition of plaintiff was to borrow \$1,200 upon abundant security. This proposition was rejected unless the plaintiff would take out a policy of life insurance in defendant company, by which the company has the chance to make \$300 in addition to the legal rate of interest on the \$1,200 loaned, and the question is, Is this transaction usurious? Applying the principles laid down by this court in the cases cited and the principles of decided cases in other courts, and the application of the principle there made, as well as that of the American and English Encyclopedia of Law, the transaction is usurious; and this is sufficiently apparent by its terms and conditions to make it our duty so to declare.

There is error and the judgment appealed from is reversed.

Faircloth, C. J., and Avery, J., dissent.

USURY is "the taking of more for the use of money than the law allows." In order to constitute usury, there must exist an intent of the parties to take more for the use of money than is allowed by law. If this intent exists, the transaction is usurious, otherwise it is not: See monographic note to *Davis v. Garr*, 55 Am. Dec. 392, on usury, and to *Bank of Newport v. Cook*, 46 Am. St. Rep. 181, showing what transactions are usurious. The form of the transaction is not material. If, as a result of the whole transaction, its object appears to have been to obtain a profit in excess of that allowed by law, it must be pronounced usurious: Note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 178, 192. An agreement to take an insurance policy, pay the premiums thereon, and, in addition, to pay the highest rate of legal interest on the money lent on such policy, is usurious: See monographic note to *Sylvester v. Swan*, 81 Am. Dec. 737, on what contracts are usurious. An agreement between an insurance corporation and a borrower that, upon the granting of a loan to him, he shall take out a policy of life insurance, the first premium of which is to be paid in advance out of the moneys loaned, is usurious: Note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 196.

HARVEY v. LINVILLE IMPROVEMENT COMPANY.

[118 NORTH CAROLINA, 693.]

CORPORATIONS—VOTING STOCK BY PROXY.—At common law, stockholders of corporations could not vote by proxy, but it is now otherwise.

CORPORATIONS—STOCK—SURRENDER OF VOTING POWER.—Each stockholder in a corporation must be left free to cast his vote, either in person or by proxy, as he deems best for the welfare of the corporation, as the other stockholders are entitled to the benefit of his free exercise of judgment. Hence, any combina-

tion or device by which a number of stockholders combine to place the voting of their shares in the irrevocable power of another is contrary to public policy and voidable.

CORPORATIONS—STOCK—DELEGATION OF POWER TO VOTE.—The power to vote stock in a corporation is inherently annexed to, and inseparable from, the real ownership of each share, and can only be delegated by proxy with power of revocation.

CORPORATIONS—VOTING STOCK—"POOLS"—PLEDGE—INJUNCTION.—An agreement between stockholders, holding a majority of the shares of a corporation, to "pool" their stock by transferring it to trustees, with full power to vote it, in solido, at corporate meetings, and to pledge it as collateral for money borrowed by the corporation is contrary to public policy and voidable, and the purchaser of such shares may, by injunction, protect his right to vote them.

Action for an injunction and other relief by W. S. Harvey against the Linville Improvement Company, Hugh MacRae, John S. Devine, and T. B. Lenoir. The company was deeply indebted, and was in the hands of a receiver, appointed by the court. The action in which the receiver was appointed had been instituted by T. B. Lenoir, against the defendant corporation, in good faith and upon the advice of his counsel, for the purpose of recovering a debt due him as executor of Walter W. Lenoir, and without any combination or confederation with any of the other defendants in the present case. After the receiver took possession, a number of the stockholders, including Wallace Hahn, David G. Worth, and S. T. Kelsey, some of which stockholders were creditors of the company, being "desirous to extricate the company from its present financial embarrassment, pay off its debts, and enable it to resume its operations," entered into an agreement to "pool" the stock owned by them in the company, and to transfer it to John S. Devine, T. B. Lenoir, and Hugh MacRae, in trust, for the purpose of borrowing money to pay off the debts of the company. The trustees were given power "to vote the said stock so transferred to them in all meetings of the stockholders of said company, to borrow money to pay off and discharge the present indebtedness of the company, and to pledge the stock so held by them, or any part of it, as collateral security for the money so borrowed." Any one or two of the trustees might, under the terms of the agreement, vote the entire stock transferred to them in any meeting of the stockholders of the company, upon being authorized, in writing, by the others so to do. The trustees did borrow nine thousand dollars upon the pledge of all the stock conveyed to them by the "pool" arrangement, including the stock owned by Hahn, Worth, and Kelsey, which the plaintiff, Harvey, claimed to have purchased from the persons last named. The "pool" arrangement was made before Harvey purchased the stock

belonging to Hahn, Worth, and Kelsey. In a few months after the "pool" arrangement was perfected, and at an adjourned meeting of the stockholders, at which were present, either in person or by proxy, over fourteen hundred shares of the capital stock of the said company, out of a total issue of fifteen hundred shares, a resolution was adopted, by a majority vote of all of the stock present, to issue first mortgage bonds to the amount of sixty thousand dollars, secured by a mortgage upon a part of the property of said company, for the purpose of paying off the debts of the company, and getting it and its property released out of the hands of the receiver. It was found by the court below that, at this meeting, the said stock was voted by the stockholders themselves, or by their proxies, and was not voted or controlled in any way under the "pool arrangement," or by the trustees therein. It was admitted on the part of the plaintiff that he had an option for the purchase of a sufficient number of shares of the capital stock of the company to give him a majority thereof; and intended to purchase the same, provided he could get control of the company. By this action the plaintiff sought to have the "pool" agreement, and the said issue of bonds declared invalid, in order that he might purchase the majority of the capital stock of the company and obtain the control thereof. The injunction was denied, and the plaintiff appealed.

Davidson & Jones, for the appellant.

Junius Davis, for the appellee.

698 CLARK, J. At common law stockholders could not vote by proxy: *Taylor v. Griswold*, 14 N. J. L. 222; 27 Am. Dec. 33, and other cases cited in *Cook on Stocks and Stockholders*, sec. 610. This is now otherwise, but it is still held that each stockholder, whether by himself or by proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy: *Cone v. Russell*, 48 N. J. Eq. 209. Various devices have been resorted to for the purpose of so tying up the stock that no one of the parties to the "pool" or combination can break the agreement. "Irrevocable" proxies to vote the stock have been given to a designated party who acted as trustee or agent. but the courts held such proxies not irrevocable and that they might be revoked at any

time: Cook on Stocks and Stockholders, secs. 610, 622; Woodruff v. Dubuque etc. Ry. Co., 30 Fed. Rep. 91; Vanderbilt v. Bennett (Pa. 1887), 2 Ry. & Corp. L. J. 409. Another plan was to place the stock of the various parties in the hands of trustees, with power to transfer the stock to themselves and to hold and vote the same, trustees' certificates being issued to the various parties, specifying the amount of stock so deposited by them and their interest in the pool, but the courts held that any holder of a trustee's certificate might at any time demand back his part of the stock: Woodruff v. Dubuque etc. Ry. Co., 30 Fed. Rep. 91, and other cases cited in Cook on Stocks and Stockholders, sec. 622. Another device was, that the parties contracted together not to sell their stock for a specified time or only to a ⁶⁰⁹ purchaser acceptable to them all. It was held that, notwithstanding such contract, any one of the parties might sell his stock to anyone he pleased and at any time: Fisher v. Bush, 35 Hun, 642; Williams v. Montgomery, 68 Hun, 416. Another plan was to restrict by a by-law the right to transfer stock, but this was held illegal: Morgan v. Struthers, 131 U. S. 246, and other cases cited in Cook on Stocks and Stockholders, sec. 332. A provision that a purchaser of a certificate of stock who sold in violation of the agreement should be entitled to the dividends, but should receive no right to vote, was likewise held invalid: Harper v. Raymond, 3 Bosw. 29. Numerous decisions affirm the correctness of the above rulings, which are based upon the illegality, because against public policy, of permitting large blocks of stock to be irrevocably tied up for the purpose of being voted in solido for the interest of a clique or section of the stockholders, and not according to the judgment of each individual stockholder for the benefit of the entire corporation. There are some few decisions trenching more or less upon the principles above stated, but we deem them contrary to sound principle of public policy, and hence not authority. In short, all agreements and devices by which stockholders surrender their voting powers are invalid: 5 Thompson on Corporations, sec. 6604. The power to vote is inherently annexed to, and inseparable from, the real ownership of each share, and can only be delegated by proxy with power of revocation. The "pooling" arrangement, admitted to have been entered into by the majority of stockholders in the present case is contrary to public policy and voidable (Woodruff v. Dubuque etc. Ry. Co., 30 Fed. Rep. 91), and the plaintiff assignee of certain of the trustees' certificates is entitled to have his name entered as the owner and holder of the shares of stock

represented by said trustees' certificates, and to have ⁷⁰⁰ said shares issued to him, should the facts be found in accordance with his allegation, and to have the defendant restrained till the hearing from voting or controlling in any way the stock purchased by the plaintiff, or in any wise interfering with the plaintiff's right to vote, control, or dispose of said stock.

Error.

Avery, J., did not sit on the hearing of this case.

CORPORATIONS.—VOTING STOCK BY PROXY was not a common-law right: See monographic note to Taylor v. Griswold, 27 Am. Dec. 60, on voting by proxy; but a by-law enacted by a private corporation, authorizing the stockholders at their meetings to vote by proxy, is valid: State v. Tudor, 5 Day, 329; 5 Am. Dec. 162. If, however, the right is not conferred by charter or by-laws, the members of a corporation cannot vote by proxy: Commonwealth v. Bringhurst, 103 Pa. St. 134; 49 Am. Rep. 119.

CORPORATIONS.—SURRENDER OF VOTING POWER.—An agreement by which stockholders of a corporation surrender their voting power, so that the shares may be voted irrespective of the wishes or directions of the owners is invalid, and an illegal voting of shares may be restrained by injunction: Thompson on Corporations, sec. 6404.

COMMERCIAL NATIONAL BANK OF CHARLOTTE v. FIRST NATIONAL BANK OF GASTONIA.

[118 NORTH CAROLINA, 783.]

CHECKS—NECESSITY OF ACCEPTANCE BEFORE ACTION.—The holder of a check cannot maintain an action against the bank upon which it is drawn until after its acceptance by that bank.

CHECKS—STIPULATION RESTRICTING PRESENTMENT BY CERTAIN AGENCIES.—A stipulation stamped on the face of a check that it will positively not be paid to a certain company or its agents is a valid restriction; and the drawer cannot be sued thereon until the check has been presented to the drawee by some other agency, and payment refused.

CHECKS—STIPULATION RESTRICTING PRESENTMENT—RESTRAINT OF TRADE—BOYCOTT.—A stipulation stamped on the face of a check that it will positively not be paid to a certain company or its agents, if made for the purpose of preventing the drawer's transactions, and the nature and extent of his business, from becoming known to a rival house by his checks passing through that channel, is not an unreasonable restriction of trade, or a boycott, where there is no evidence of a conspiracy to injure the agency named.

Action to recover upon a check. The plaintiff and defendant banks were both national banks, incorporated, and engaged in a general banking business, the former being located in the city of Charlotte, North Carolina, and the latter in the town of Gas-

tonia, in the same state. The defendants, Costner, Jones & Co., were a copartnership, located in the town of Gastonia, and engaged in the general mercantile business. The Gastonia Banking Company was a copartnership engaged in the general banking business, as private bankers, in Gastonia; and the individual members of this firm were engaged, in Gastonia, in the general mercantile business, under the firm name of John F. Love & Co., and were rivals of, and competitors with, Costner, Jones & Co., for the trade in Gastonia and the surrounding country. Costner, Jones & Co., being desirous that their rivals in business should not know of or handle the checks drawn by them on the defendant bank, with which they kept their banking account, made an arrangement with the defendant bank whereby the latter had rubber stamps prepared, and furnished to such of its customers and depositors as desired them, and which would imprint across the face of a check the following words: "This check positively will not be paid to the Gastonia Cotton Manufacturing Co., the Gastonia Banking Co., or any of their agents." Costner, Jones & Co., being indebted to the Charlotte Hardware Company of Charlotte, North Carolina, in the sum of one hundred and thirty-four dollars and forty-one cents, drew and transmitted their check for that amount. It was drawn upon the First National Bank, Gastonia, North Carolina, and was stamped on its face with the words above quoted. The Charlotte Hardware Company indorsed the check to the plaintiff bank for full value, which bank transmitted it to the Gastonia Banking Company, its regular correspondent at Gastonia, for collection and remittance. The check was presented by the Gastonia Banking Company, to the defendant bank for payment, during legal banking hours, but payment was refused. A notary then presented the check for payment, which was refused, and the notary protested it for nonpayment, and notified the drawers and indorsers of the fact of nonpayment. The check was returned to the plaintiff, who brought suit thereon.

Jones & Tillett, for the appellants.

Burwell, Walker & Cansler, for the appellee.

⁷⁸⁶ CLARK, J. The holder of a check cannot maintain an action against the bank upon which the check is drawn until after the acceptance of the check by the bank: *Bank of the Republic v. Mallard*, 10 Wall. 153; *Hawes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870; *Marriner v. John L. Roper Lumber Co.*, 113 N. C. 52. ⁷⁸⁷ This is the uniform line of decisions in the federal courts and our own, and it is sustained by the over-

whelming weight of authority in other courts, though there are a few decisions in other states to the contrary. The bank is the agent of the drawer; till acceptance of the check, it has assumed no liability to the payee; its liability, if any, is to the drawer, whose checks it has agreed to pay if it has the drawer's funds in hand, and for breach of that contract it is liable to the drawer, not to the payee—"To its own master it must stand or fall." A check is simply an order given by the principal upon his agent, and it is always open to the principal to countermand an order to its agent before it is executed, and there are occasions when it is important, to prevent imposition, that the drawer should have power to stop the payment of his check, without casting any liability upon the drawee. If the principal, the drawer, die before a check is presented, it becomes invalid, which could not be the case if the mere drawing the check created any liability in the drawee.

But the more important point, since it is now presented to us for the first time, is the validity of the stipulation stamped on the face of the check: "This check will positively not be paid to the Gastonia Banking Company or its agents." It appears that the check has never been presented to the drawee, the defendant bank, except by an agent of the Gastonia Banking Company. Consequently, if this restriction is valid, the holder cannot maintain this action against the drawer till the check has been presented to the drawee by some other agency and payment refused. In England the system of "crossed checks" has long been recognized as valid: 2 Daniel on Negotiable Instruments, sec. 1585 a; *Smith v. Union Bank*, L. R. 10 Q. B. 295, which was affirmed on appeal, and is reported in L. R. 1 Q. B. Div. 31. By that system there is stamped across the face of ⁷⁸⁸ the check the name of a certain banker through whom it must be presented for payment, and if presented by any one else it will not be honored. This does not destroy its negotiability in any wise. The present case does not go that far, but merely stipulates that the check will not be honored if presented through one agency named. This cannot be deemed an unreasonable restriction of trade. Nor is it a boycott. There is no evidence of a conspiracy to injure the agency named, but it is agreed as a fact that it was an effort on the part of the drawer firm to prevent its transactions and the nature and extent of its business becoming known to a rival house by its checks passing through that channel. Besides, if it were a boycott, the parties to it are the drawer and the payee who accepted the check with that restriction stamped on it. And if it was an illegal transaction, the check itself, and not

merely the stipulation which is part of it, would be void. *Ex mala causa non oritur actio*. The restriction is a part of the check (Tiedeman on Commercial Paper, secs. 41, 42; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382), and, if it is invalid, the court could not separate the good from the bad (*Saratoga County Bank v. King*, 44 N. Y. 87), but it would be all bad and the holder could not recover. In analogy, a conveyance of property, real or personal, with a condition not to alien to a certain person or class of persons, or for a certain time, is valid: *Cowell v. Springs Co.*, 100 U. S. 57; *Gray v. Blanchard*, 8 Pick. 288; *Sheppard's Touchstone*, 129, 131; *Coke on Littleton*, 223.

In *Smith v. Lawrence*, 1 Hayw. (N. C.) 200, 1 Am. Dec. 556, this court held that a note could be limited so as to be payable to the payee only. But it is not necessary to consider here the principle maintained in that case, that the drawee can by stipulation therein make the check not assignable, for this is not attempted here, but there is simply a stipulation ⁷⁸⁹ that it shall not be paid if presented through the agency named. *Wilcoxon v. Logan*, 91 N. C. 449, holds merely that where a note is made payable to A B, without the addition of the words "or order," or "bearer," the holder thereof can maintain an action thereon, being the party in interest. There can be no question raised as to the validity of an express stipulation that the note could not be assigned at all, or would not be honored if presented by a particular party, as in this case, nor by any party except one named, as in the case of the English "cross checks." These questions could not arise, for there was in that case no stipulation to either effect. On the facts agreed, judgment should have been entered for the defendants.

Reversed.

CHECKS—NO ACTION BEFORE ACCEPTANCE BY DRAWEE.—The holder of an unaccepted check cannot recover of the drawee: *Pickle v. Muse*, 88 Tenn. 380; 17 Am. St. Rep. 900, and note; *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255; 50 Am. Rep. 417; *Colorado Nat. Bank v. Boettcher*, 4 Colo. 185; 40 Am. Rep. 142. Other cases, however, hold that there is no such thing as "acceptance" of checks in the ordinary sense of the term: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403; that no acceptance is required or expected: *Minot v. Ross*, 156 Mass. 458; 32 Am. St. Rep. 472; and that the holder can maintain an action against the bank before it is accepted or certified as good by the bank, if the drawer of the check has funds deposited in the bank to an amount sufficient to meet it when presented for payment: *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177; 44 Am. St. Rep. 700, and note.

ALEXANDER v. GIBBON.

[118 NORTH CAROLINA, 796.]

PARTITION—TENANTS IN COMMON—EJECTMENT.—

When sole seisin is pleaded, in a proceeding among tenants in common for partition, it becomes substantially an action of ejectment, subject to the general rules applicable to all actions of ejectment.

ESTOPPEL—COMMON SOURCE OF TITLE.—The rule of estoppel, based upon a common source of title, is not an arbitrary fiction of the law, but is based on sound reasoning and logical deduction. Hence, if two parties claim title from a third person, it is conceded that the latter had the title, and it is unnecessary to prove that he did have it.

PARTITION AMONG HEIRS—SOLE SEISIN—EVIDENCE.

If, in a proceeding, for partition, among heirs, who are tenants in common, the husband of one of the feme defendants is made a party defendant, and he pleads sole seisin, it is competent to show that he entered under a contract and agreement with the heirs to pay taxes, and to look after, and to take care of, the property for the heirs, as this would create, as between him and the heirs, the relation of landlord and tenant. Such evidence is also admissible to establish the fact of tenancy as affecting the question of title by occupancy.

LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE—PARTITION.—A tenant is estopped to deny the title of his landlord, and this rule applies, in a proceeding among heirs for partition, when sole seisin is pleaded by a tenant of the heirs.

LANDLORD AND TENANT—POSSESSION OF TENANT IS THAT OF LANDLORD.—Possession by a tenant is the possession of the landlord. Hence, in making out title by occupancy, the period covered by the possession of the landlord, and of his heirs after his death, is to be added to the period covered by the possession of the tenant under the heirs.

NEW TRIAL—ERRONEOUS INSTRUCTIONS.—A complicated, involved, and confusing instruction which leaves a jury in doubt as to whether an adverse possession, sufficient to establish title in the possessor, must be thirty or fifty years, is error authorizing a new trial.

ADVERSE POSSESSION—TACKING POSSESSIONS.—In proving title by adverse possession, the period of occupancy by the ancestor and the heir respectively should be added together.

ADVERSE POSSESSION—PRESUMPTION.—The law presumes possession unexplained to be adverse possession.

LIMITATION OF ACTIONS—COMPUTATION OF TIME.—In computing time, under the present laws of North Carolina, to determine whether the statute of limitations has run, the time between May 20, 1861, and January 1, 1870, is no longer to be omitted, except in actions commenced before January 1, 1893.

COTENANCY.—THE POSSESSION of one tenant in common is the possession of all.

REAL PROPERTY—POSSESSION.—The law presumes the possession to be in the owner, where there is no adverse possession.

ADVERSE POSSESSION.—THE POSSESSION of a tenant is not adverse.

PARTITION—PLEADING.—An allegation of possession in a petition for partition is not required.

Clarkson & Duls, for the appellants.

Burwell, Walker & Cansler, for the appellee.

797 **FURCHES, J.** This is a proceeding commenced in the superior court of Mecklenburg (before the clerk), by a part of the children and heirs at law of Joseph M. Alexander, against the other children and heirs at law of said Alexander, and the husbands of the feme defendants, for sale and partition of land. All the heirs, so made defendants, answer and admit the tenancy in common, except Harriet, who is the wife of the defendant, N. Gibbon. She files no answer, and thereby admits the allegations of the complaint and the tenancy in common. The defendant, N. Gibbon, who is not a child and heir at law of Joseph M. Alexander, alone answers the complaint, which consists of six paragraphs, as follows:

“The defendant, N. Gibbon, answers the petition and says: That the land mentioned and described in said petition is not the property of the persons named as the tenants **798** in common thereof, but that he is sole seised of said land, and is in possession of it in his own right.”

It is admitted, as claimed by defendant, that when sole seisin is pleaded, in a proceeding among tenants in common for partition, it becomes substantially an action of ejectment: *Huneycutt v. Brooks*, 116 N. C. 788. And it then becomes subject to the rules of law applicable to trials in actions of ejectment—that plaintiffs must recover by the strength of their own title, and not on the weakness of defendant’s title. This is the doctrine enunciated in *Huneycutt v. Brooks*, 116 N. C. 788.

And while this case and this line of authorities puts the burden of proof in actions of ejectment on the plaintiffs, it also puts upon the defendant the burden of the rules pertaining to such trials.

Plaintiffs then may establish their title in any way they might do if this had originally been commenced as an action of ejectment—by showing an unbroken line of conveyances from the state to them, or to Joseph M. Alexander, their father, and that he is dead, or by showing possession in Joseph M. Alexander, and those under whom he claimed to the time of his death, and the possession of his heirs at law since his death, for a sufficient length of time to establish or to ripen their title into a perfect title; or, by way of estoppel, by showing that the defendant

claims title from the same source as plaintiff; or by showing that he entered and sustains the relation of tenant to plaintiffs: *Conwell v. Mann*, 100 N. C. 234.

These are the general rules applicable to all actions of ejectment, and must apply to actions for partition where sole seisin is pleaded, and the action becomes substantially an action of ejectment, but in this case they are peculiarly applicable and illustrate the wisdom of their application. The plaintiffs allege that as the heirs at law of Joseph M. ⁷⁹⁹Alexander, they and the other heirs at law of said Alexander, as such heirs, are tenants in common of the land described in the complaint. All the heirs answer and admit these allegations except Harriet, who files no answer and in this way admits the allegations of the complaint. But the defendant, N. Gibbon, not an heir of J. M. Alexander, but who happened to be the husband of Harriet, and in that way made a defendant, answers and says it is not true that the plaintiffs and defendants, who are the heirs of J. M. Alexander, are the owners of this land, but that he is the owner. And when plaintiffs offered evidence to show that defendant, Gibbon, entered as the tenant of the heirs and was to pay the taxes and was to look after and take care of the land for the heirs, he objected to evidence and the court ruled it out. In this there was error. The authorities are so numerous and uniform that defendant admits that this evidence would have been competent if the heirs had brought an action of ejectment against him. But he says, as they brought an action for partition, which he has turned into an action of ejectment, it is incompetent. This cannot be so. To sustain this ruling of the court would be to destroy one of the most valuable rules of practice and evidence, a rule honorable alike for its age and for its usefulness. To sustain such rulings would be to destroy all reasoning by analogy and the logic of the law.

This rule of estoppel, based upon a common source, is not simply an arbitrary fiction of the law. It is based on sound reasoning and logical deduction. If two parties claim title from A it must be conceded by them that A had the title, or they would not claim under him. This being so, it is not necessary to consume time in proving what is admitted to be true—that A had the title. ⁸⁰⁰Then A is made the starting point, and it is only left to determine who has A's title or the title derived from A.

In a case of tenancy in common, where the parties claim as heirs at law, under the canons of descent, the establishment of the common source determines the rights of the parties. As, in this case, all the heirs at law of J. M. Alexander claim that he

was the owner of this land at the time of his death, this establishes as to them the legal title to this land, and they are forever estopped to deny this, just as any other parties of record are estopped by the judgment of a court of competent jurisdiction. So, we see that the operation and effect of this rule of estoppel is to establish the title in the plaintiffs. And the rule that the plaintiff must recover by the strength of his own title, and not by the weakness of the defendant's title, is preserved.

When this case was argued, and when first considered, it was treated by us as if the plaintiffs were proposing to prove the declarations and admissions of one of the heirs at law of Joseph M. Alexander.

But, upon further consideration, we find this is not the case. Had this been so, we would have held that this evidence was competent, as tending to show that the heir at law of said Alexander claimed title under the common ancestor and disprove the plea of sole seisen: *Nelson v. Whitfield*, 82 N. C. 46; *Graybeal v. Davis*, 95 N. C. 508; *Conwell v. Mann*, 100 N. C. 234; *Clifton v. Fort*, 98 N. C. 173, and that line of cases.

But it was clearly admissible to show that the defendant, N. Gibbon, entered under a contract and agreement with the heirs of J. M. Alexander to pay the taxes and to look after and take care of the property for the heirs, which constitutes, as between him and the heirs, the relation of landlord and tenant; and that he was thereby ⁸⁰¹ estopped to deny the title of the heirs: *Cooper v. Axley*, 114 N. C. 643; *Conwell v. Mann*, 100 N. C. 234.

It was also admissible to establish the fact of tenancy, as affecting the question of title by occupancy. As it is a well-established principle of law that possession by a tenant is the possession of the landlord, and whenever it is established that N. Gibbon was the tenant of the heirs of J. M. Alexander, then the time that he has been in possession is to be added to the possession of J. M. Alexander and his tenants, as evidence going to make out title by occupancy or possession.

Defendant, N. Gibbon, asked for special instructions, which were given by the court, as asked; each of these instructions were excepted to by plaintiffs, and each exception must be sustained. The instructions are as follows:

"1. That in order to show title in themselves, plaintiffs must satisfy the jury, by preponderance of evidence, that there has been open, notorious, and adverse possession of the land for thirty (30) years by J. M. Alexander. This is necessary to show title out of the state. That plaintiffs must, also, show an open, notorious,

adverse, and continuous possession for twenty years in J. M. Alexander, in order to vest the title in them as his heirs.

"2. That this possession must be open and notorious and continuous. If there was an interval of several years, during which J. M. Alexander had no such possession, the possession would not be continuous. The possession must also be adverse, and the mere fact that J. M. Alexander actually occupied the land or had possession of it would not be sufficient to show an adverse possession, because the plaintiffs must show, not only a possession, but must go further and show affirmatively that this possession was adverse, as the law does not infer from the mere fact of the possession that it was adverse.

³⁰² "4. That in ascertaining the length of the possession of J. M. Alexander, the time from the 20th of May, 1861, to the 1st of January, 1870, must be excluded from the count.

"5. That plaintiffs must not only show an open, notorious, adverse, and continuous possession for twenty years, but the said possession, in order to confer a title good against the defendant, N. Gibbon, must have been under known and visible lines or boundaries."

The first instruction is erroneous, for the reason that it is complicated, involved, and confusing. It at least leaves the jury in doubt as to whether the thirty years' adverse possession is sufficient to establish title in the plaintiffs, or whether it requires both thirty years and twenty years, making fifty, to do so. It is also erroneous in that it limits the time in which plaintiffs may make out their title by adverse possession to the death of J. M. Alexander; whereas the plaintiffs, the heirs, should have been allowed to show possession in themselves since the death of their father, if they could do so.

The second prayer and instruction is erroneous in that it holds that possession or occupation of itself is not sufficient to constitute adverse possession. "But that plaintiffs must go further and show affirmatively that this possession was adverse, as the law does not infer from the mere fact of the possession that it was adverse."

To sustain this ruling would be to overrule *Bryan v. Spivey*, 109 N. C. 57, which expressly holds that the law presumes possession unexplained to be adverse possession.

The fourth prayer and instruction are erroneous. Sections 136 and 137 of the code, which suspended the running of the statute of limitations, and the presumptions of time, were repealed by chapter 113 of the laws of 1891, but not to apply to actions com-

menced prior to the 1st ⁸⁰³ of January, 1893, and, of course, apply to all actions commenced after that time. This action was commenced on the thirty-first day of May, 1895; *Nunnery v. Averitt*, 111 N. C. 394.

But the learned counsel for the defendant, N. Gibbon, in his argument said if there were errors in the prayers for instructions, which were given by the court—and he did not think there were—that they should not avail the plaintiffs, for the reason that they had failed to allege in their complaint that they were in possession of the land described in the complaint.

We have seen that one of the heirs at law of J. M. Alexander (Mrs. Gibbon) was living on the land, and if the defendant, N. Gibbon, is the tenant of the heirs, as they allege he is, they are in possession through him. The possession of one tenant in common is the possession of all. The law presumes the possession to be in the owner, where there is no adverse possession: *Thomas v. Garvan*, 4 Dev. 223; 25 Am. Dec. 708. And the possession of N. Gibbon cannot be adverse, if he entered as plaintiff's tenant. So, it is seen that, at the most, this would have been but a formal statement in this case. It was not made below, or it would in all probability have been amended, and for this reason we would dislike to feel compelled to sustain this objection.

The defendant's counsel cites *Alsbrook v. Reid*, 89 N. C. 151, which seems to sustain him. But upon examination we find that sections 1892 and 1903 do not sustain this objection. Section 1892 provides for partition, in the following language: "The superior court on petition of one or more persons claiming real estate as tenants in common." And section 1903 of the code provides for partition "by one or more of the parties interested therein." And while it seems clear that these sections, which provide for the partition of land among tenants in common, ⁸⁰⁴ do not require any such averment in the complaint, we would still hesitate to overrule what seems to be held to be the construction in *Alsbrook v. Reid*, 89 N. C. 151, upon this authority alone. But *Alsbrook v. Reid*, 89 N. C. 151, cites two cases as authority for this ruling, and upon examination we find that neither one of them sustains this ruling, and *Thomas v. Garvan*, 4 Dev. 223, 25 Am. Dec. 708, one of the cases cited, is directly to the contrary—holding that the law presumes possession unless there has been an actual ouster. And the other case cited as authority for the ruling in *Alsbrook v. Reid*, 89 Am. Dec. 151, is *Ledbetter v. Gash*, 8 Ired. 462. And this case does not even discuss the question.

Upon these authorities we feel justified in overruling that part of *Alsbrook v. Reid*, 89 Am. Dec. 151, which requires it to be alleged in the petition or complaint that the tenants in common are in possession of the land they ask to have partitioned, and which makes this allegation a jurisdictional question. This had in effect been done in *Epley v. Epley*, 111 N. C. 505.

If an action is wrongfully brought for partition, this may be taken advantage of by answer.

There is error as pointed out in this opinion, for which the plaintiffs are entitled to a new trial.

New trial.

ESTOPPEL—COTENANTS—HEIRS—COMMON SOURCE OF TITLE.—As an estoppel exists between the grantees of a common grantor, neither party in proving title need go back of the first conveyance from such common grantor. Therefore, if one of several cotenants has acquired possession of property under a conveyance from a common grantor or ancestor, he cannot, while he remains in possession, dispute the common title, nor deny to his cotenant any right to the possession of the property because of any defect in their common title, even though he has acquired a paramount adverse title: See monographic note to *Rice v. St. Louis etc. Ry. Co.*, 47 Am. St. Rep. 75, 78, on claimants under a common source of title. Where the rights of an ancestor in possession of land descend to his heirs, each of them is estopped, whether his title was good or bad, from acquiring and asserting any adverse title to the property, and, if either acquires any paramount title, he holds it for the benefit of all: *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 53 Am. St. Rep. 804.

COTENANCY — ADVERSE POSSESSION — LIMITATION OF ACTIONS—PARTITION—HEIRS.—The possession of one cotenant is, prima facie, the possession of all, though he may make his possession adverse by actual ouster, or by setting up a claim, in his own right, to the whole tract of land in question and holding adverse possession thereof for the period prescribed by the statute of limitations: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note; *Oglesby v. Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177, and note; *Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579; *Peden v. Cavins*, 134 Ind. 494; 39 Am. St. Rep. 276; *King v. Carmichael*, 136 Ind. 20; 43 Am. St. Rep. 303, and note. A tenant in common out of possession, if his right of entry still remains, may maintain a suit for partition: Note to *Barnard v. Pope*, 7 Am. Dec. 228; monographic note to *Nichols v. Nichols*, 67 Am. Dec. 706, on who may compel partition. A bill in equity for partition must state the complainant's own title, and the title of the defendant, whereby it shall appear that they do claim to hold the land as cotenants: *Ramsay v. Bell*, 3 Ired. Eq. 209; 42 Am. Dec. 163. The only indispensable requisite to entitle a co-owner, applying for partition, to relief is that he shall show a clear legal title: *Ransom v. High*, 37 W. Va. 838; 38 Am. St. Rep. 67. The fact that the defendant is in adverse possession of property sought to be partitioned, claiming title thereto in severalty, does not prevent a court of equity from proceeding with the suit for partition, and determining all the questions which may arise therein, if he claims under one who was a joint heir with the complainant, or with those under whom the complainant claims: *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 53 Am. St. Rep. 804. The possession of one tenant in common is prima facie not adverse to his cotenants: Note to *Stewart v. Stewart*, 35 Am. St. Rep. 72.

ADVERSE POSSESSION—TACKING POSSESSIONS—LANDLORD AND TENANT—HEIRS.—The connected, successive, and continuous possession of a landlord by his tenant, his heirs and their grantees, to the land in dispute may be tacked together so as to form a continuous and uninterrupted possession adverse to the true owner for the period of time essential to give title by adverse possession: *Ramsey v. Glenny*, 45 Minn. 401; 22 Am. St. Rep 736, and note showing that the adverse possession of the heir may be tacked to that of the ancestor. Compare note to *Innis v. Miller*, 13 Am. Dec. 331-333, on tacking successive possessions. Possession is never deemed adverse when it is rightful, and is no invasion of the rights of others: *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305.

REAL PROPERTY—POSSESSION — TITLE — PRESUMPTION. The possession of realty is prima facie or presumptive evidence of title in the possessor until the contrary is shown by stronger evidence: See monographic note to *Plume v. Seward*, 60 Am. Dec. 601, on possession as evidence of title. One in possession of real estate is presumed to have title: *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413; 52 Am. St. Rep. 890.

LANDLORD AND TENANT—POSSESSION OF TENANT—DENIAL OF LANDLORD'S TITLE—COTENANCY.—The possession of a tenant is the possession of the person under whom he holds: *McColman v. Wilkes*, 3 Strob. 465; 51 Am. Dec. 637. A tenant cannot set up title in himself or a third person while the tenancy continues: *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462. A tenant is estopped to deny his landlord's title: *Franklin v. Merida*, 35 Cal. 558; 95 Am. Dec. 129, and note; *Williams v. Walt*, 2 S. Dak. 210; 39 Am. St. Rep. 768. The sole use and occupation of common property by one tenant in common does not create the relation of landlord and tenant between him and his cotenant: *Hamby v. Wall*, 48 Ark. 135; 3 Am. St. Rep. 218.

LLOYD v. ALBEMARLE & RALEIGH RAILROAD COMPANY.

[118 NORTH CAROLINA, 1010.]

RAILROADS—NEGLECT TO PROVIDE HEADLIGHT—PROXIMATE CAUSE OF INJURY.—If a person lying on a railroad track, at night, is run over and killed by an engine having a tender in front, with no headlight, and the jury find that the engineer might, by the use of a headlight, have seen the person in time to avoid the injury, then the failure to provide a headlight, and to have it at the front, was a continuing negligent omission of duty, constituting the proximate cause of the injury, as the performance of this duty would have given the railroad company the "last clear chance" to avoid the injury.

RAILROADS—PERSON LYING ON TRACK—INJURIES—CONCURRENT NEGLIGENCE.—Though a person lying insensible upon a railroad track is drunk, and is run over and killed by a railroad train, his negligence is not deemed concurrent, where the company's servants, by the exercise of ordinary care, could have seen him in time to prevent the injury by the proper use of the appliances at their command.

RAILROADS—HEADLIGHT AND STOPPING TRAIN—QUESTIONS FOR JURY.—If a person lying insensible on a railroad track is run over and killed by a train of cars, it is a question for the jury to determine, by the exercise of common sense and the use of knowledge acquired by observation and experience, as to how far an engineer can see an object on the track with a headlight, and as to the distance within which a moving train can be stopped.

RAILROADS—HEADLIGHT—IDLE EVIDENCE.—It is idle to offer witnesses to conclude either courts or juries from inquiring whether a headlight helps an engineer to see or so blinds him as totally to prevent his seeing.

Action to recover damages for the negligent killing of plaintiff's intestate. There was a judgment for plaintiff, and the defendant company appealed.

J. L. Bridgers, for the appellant.

Don Gillian and J. H. Blount, for the appellee.

1011 AVERY, J. The plaintiff's intestate was killed in the night by an engine running with tender in front at a speed of about twenty-five miles an hour and carrying a train of cars. He was on the end of a trestle when stricken. The only light used on the tender was a small hand-lantern, which was held by a man placed on the tender for that purpose. This presents the question so fully discussed in *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616, 53 Am. St. Rep. 611, and cases that have followed at this term. Notwithstanding the negligence of the plaintiff's intestate in exposing himself to danger, could the defendant, by subsequently avoiding some careless act or negligent omission of duty, have prevented the collision with its serious consequences? The engine could not have **1012** been turned around without the use of a turntable, and, under the circumstances, it is not probable that, by keeping the most vigilant outlook, with the small lantern on the tender, the defendant could have seen the intestate in time to stop the train before it came in contact with him—if we suppose that he was lying prostrate upon the track and apparently helpless. The court carefully instructed the jury that, if the engineer or watchman actually saw the intestate walking upon the track, apparently in possession of all his powers and faculties, either was warranted in acting on the assumption that he would step off before the train reached him, unless he was seen upon a trestle with all of the peril incident to such a situation: *Clark v. Wilmington etc. R. R. Co.*, 109 N. C. 430. We may assume that, acting upon the instruction given, the jury concluded that, by the exercise of proper care, the defendant's servants might have seen the intestate in time to prevent the collision, and that, if seen, he would have appeared to them to be prone upon the track or in peril on the trestle. The point involved may be discussed upon the supposition that the jury did not believe, from the testimony, that the deceased was walking upon the track beyond the trestle when he was seen, or could by a proper outlook have been seen. But it was negligence on the part of the de-

fendant to run its engine after night, rear in front, without such a light, for two reasons: 1. Because, by its aid, the intestate might possibly have been seen in time to stop the train and avert the accident; and 2. Because every person who used the track as a footway under the implied license of the defendant had reasonable ground to expect that such care would be exercised and to feel secure in acting upon that supposition. But a witness was introduced who testified that the engineer, with the aid of a headlight, could not, under any circumstances, have seen a ¹⁰¹³ person on the track in his front in time to have stopped the train before coming in collision with him. This was an opinion which the jury were not obliged to accept as conclusive. How far the engineer ought to have been able to see in front by means of a good headlight is a question (like determining within what distance a train can be stopped under given circumstances) the solution of which depends upon the exercise of good common sense and the use of knowledge acquired by observation and experience: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and authorities there cited. Both inquiries were involved in passing upon the issues, and the jury were at liberty to take notice of such matters of general knowledge as are involved in the determination of the question whether a headlight in front would have enabled the engineer to see the injured person in time, by the use of the appliances at his command, to have prevented the accident. If the jury found that a headlight would have enabled the defendant, by due diligence on the part of its servant, to have seen the intestate in time to have stopped the train before reaching him, then the failure to provide one and have it at the front was a continuing negligent omission of duty, the performance of which would have given the defendant the last clear chance to prevent the injury, and therefore have made its negligence the proximate cause of it: *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616; 53 Am. St. Rep. 611. The omission of duty consisted in running and continuing to run the train without proper light in front. After the intestate went upon the track, and possibly fell asleep there, the defendant's servants, seeing it was dark, might have stopped the train upon the track and waited till morning before moving on toward Tarboro. A still safer course would have been to have run back to a turntable and placed the headlight in front before starting. It is idle to offer witnesses to ¹⁰¹⁴ conclude either courts or juries from inquiring whether a headlight helps an engineer to see or so binds him as totally to prevent his seeing. If there were any foundation for

the defendant's contention on this point, it might be questionable whether the warning to persons in the front would not be given at too great a cost, if enabling them to see rendered it impossible to avert injury by keeping an outlook from the engine. In refusing to desist from running in such a manner after night, the defendant's servants voluntarily incurred such risk every moment as the jury found due to the failure to move with the headlight in front. This case is easily distinguishable from *Styles v. Richmond etc. R. R. Co.*, 118 N. C. 1084. There the judge, in effect, told the jury that the failure to remove earth, which had been allowed negligently to accumulate before the plaintiff attempted to escape danger from a passing train by going upon it, was the proximate cause of the injury. The negligence in the case at bar consisted in running without a headlight, if by its use the train might have been stopped after the injured party exposed himself. The leaving of the earth unmoved was a fact accomplished before the plaintiff, *Styles*, attempted to take refuge upon it. It could not have been taken away then in time to avert the injury. In the case at bar, it was a question for the jury whether, after the plaintiff's intestate had exposed himself to danger, the defendant's servants might, by the use of a headlight, have seen him in time to have stopped the engine and averted the accident, and the court properly left the jury to determine it. It is now settled law in this state (*Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616; 53 Am. St. Rep. 611) that, notwithstanding the fact that a person who is lying insensible upon a railway track is drunk, his negligence is not deemed concurrent, where the company's servants, by the exercise of ordinary care, could have seen him in time to have prevented the injury by the proper ¹⁰¹⁵ use of the appliances at their command. The fact that the court below adhered to this view of the law before *Smith v. Norfolk etc. R. R. Co.*, 114 N. C. 728, had been overruled cannot be assigned as error, now that the later ruling of the court sustains the position of the trial judge. The charge is long, but a careful view of it discloses no such inconsistency as was calculated to mislead the jury. The inference which must be drawn from the finding in the light of the instruction given is, that the jury believed that with a headlight the engineer could, by due diligence, have discovered that the plaintiff's intestate was lying helpless upon the track in time to have stopped the train before coming in contact with him.

For the reasons given, the judgment is affirmed.

RAILROADS — NEGLIGENCE—PROXIMATE CAUSE—"LAST CLEAR CHANCE"—DRUNKENNESS.—He who has the "last clear chance" to avert injury, notwithstanding the previous negligence of the injured party, is solely responsible for such injury resulting from his failure to exercise ordinary care. If, by the exercise of ordinary care, a railway engineer can see that a human being is lying, apparently helpless, on the track in front of his engine, in time to stop the train by the use of the appliances at his command, and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to exercise such ordinary care. Such failure is the proximate cause of the injury, although the party injured was originally guilty of negligence in getting upon the track: *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616; 53 Am. St. Rep. 611, and note; monographic note to *Louisville etc. R. R. Co. v. Johnson*, 25 Am. St. Rep. 45, on intoxication as contributory negligence. Drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the injury received. While intoxication does not excuse negligence, a railway company is bound to exercise toward a drunken person on the track the same due and reasonable care as it is bound to exercise toward a sober person. Therefore, if a person on a railroad track is so badly intoxicated as to be helpless or insensible to danger, the employes of the company, while running a train, have no right to presume that he will get out of the way. They must act upon the hypothesis that he may not, or cannot, and use a proper degree of care to avoid injuring or killing him. If they fail to do this the company is answerable in damages, if by the use of such care, after becoming aware of his negligence, they could have avoided injuring him: Note to *Louisville etc. R. R. Co. v. Johnson*, 25 Am. St. Rep. 39, 45, discussing the subject at length.

RAILROADS—HEADLIGHTS.—It is the duty of a railway company to adequately light its engines and cars at night, that its servants thereon may be enabled to see obstructions, animate and inanimate, upon the line at as great a distance as possible, by the use of the best appliances in practical use: *Nashville etc. R. R. Co. v. Smith*, 6 Heisk. 174.

STATE v. TAFT.

[118 NORTH CAROLINA, 1190.]

MUNICIPAL CORPORATIONS—ABATEMENT OF NUISANCE—LAWFUL BUSINESS.—Power given to a town to abate nuisances does not authorize it to prohibit, absolutely, a lawful business which is not necessarily a nuisance, but it may abate such business when it is so carried on as to constitute a nuisance.

MUNICIPAL CORPORATIONS—ORDINANCES—SECOND-HAND CLOTHING.—A town which has power to abate nuisances, and to preserve the public health, may, by ordinance, restrict the sale of secondhand clothing by compelling fumigation and disinfection, or requiring proper assurances that it has not been obtained from infected places.

MUNICIPAL CORPORATIONS—ORDINANCES. — COURTS HAVE POWER to inquire into any alleged abuse of the powers of cities and towns in the enactment of ordinances, and to restrain them when they transcend the limits of their authority.

MUNICIPAL CORPORATIONS — POLICE POWER—LAWFUL BUSINESS—SECONDHAND CLOTHING—UNREASONABLE ORDINANCE.—Municipal authorities cannot, under the claim

of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. Hence, as the sale of secondhand clothing is not a nuisance per se, an ordinance which absolutely prohibits the importation and sale of such clothing is unreasonable and void, because it prohibits a business lawful in itself, and not necessarily injurious or dangerous.

Indictment for the violation of a town ordinance, upon which the defendant was convicted, and he appealed.

The attorney general and F. S. Spruill, for the state.

Charles M. Cooke, for the appellant.

1191 MONTGOMERY, J. The ordinance, for a violation of which the defendant was convicted, is as follows:

"No. 47. That it shall be unlawful for any person, merchant, or dealer to import into the town of Louisburg, for the purpose of selling or offering for sale, any secondhand clothing, garment, cloth, or bed furniture; and any person, merchant, or dealer who shall import any such article into said town with the purpose aforesaid, or shall sell or offer the same for sale, shall for every such act be subject to a fine of twenty-five dollars."

It is enacted in chapter 142 of the Private Acts of 1887 that the general laws in regard to cities and towns, in the code, shall apply to the town of Louisburg; and it is provided in that chapter of the code that the commissioners of towns "may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens," and that "they may enforce their by-laws and regulations by imposing penalties on such as violate them. The preamble sets forth that the object of the ordinance was the protection of the health of the community. Beyond question the general assembly has power to authorize the commissioners of towns to pass by-laws intended to prevent the introduction of infectious **1192** or contagious diseases and to preserve the public health; and the powers conferred under the statutes above referred to are admitted to be sufficient for those purposes. Such ordinances are regarded as police regulations, are of the utmost consequence to the general welfare, and, if they be reasonable, impartial, and not against the general policy of the state, must be submitted to by individuals for the good of the public. In truth, the public health and the peace and good order of the community ought to be the chief concern of the authorities of cities and towns; and the courts are quick to encourage watchfulness in this respect on their part, will always presume that they have acted from a sense of propriety and necessity, and will never interfere with or set aside their ordinances, unless it ap-

appears clearly that they are unreasonable or beyond the scope of their authority. It is not to be doubted, however, that the courts have the right to inquire into any alleged abuse of their powers and to restrain them when they transcend the limits of their authority.

The question presented in this case for our consideration is, whether the commissioners can, under the powers given them by law, in their discretion, absolutely prohibit a lawful business not in itself necessarily a nuisance, but which may be conducted without danger to the community, when properly regulated. The sale of secondhand clothing is not a nuisance per se, but is, on the other hand, a lawful business, and, under proper regulations, may be so conducted as to be without danger to the health of the community, and at the same time to be of great benefit to a large portion of the people. There is nothing dangerous to health in articles of secondhand clothing of themselves; they can only become noxious by reason of prior use, of having been worn or possessed by persons themselves infected, or living in infected communities. The town ¹¹⁹³ authorities would have the right to compel fumigation and disinfection of secondhand clothing; they might require proper assurances, before such articles were imported or offered for sale, that they have not been brought in, or brought from, markets or places where epidemics of contagious or infectious diseases were or had been recently prevailing; or, they might prohibit the further sale of such stocks from which articles had been sold and had communicated disease. In the case of *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, the ordinance was not as prohibitory as the one before us, and the court there, in passing upon its validity, said: "Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell, or otherwise deal in secondhand or cast-off garments, blankets, bedding, and bedclothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some time and in some places it is infected with trichina." The same principle is also decided in *Weil v. Ricord*, 24 N. J. Eq. 169.

We are of the opinion that the commissioners transcended their powers in the passing of this ordinance; that it is unreasonable,

in that it is prohibitory of a business lawful in itself, and that it is void

Error.

MUNICIPAL CORPORATIONS—POWER OF, TO DECLARE WHAT IS A NUISANCE.—A municipal corporation cannot declare that to be a nuisance which is not such in fact: Note to Mayor etc. of Savannah v. Mulligan, 51 Am. St. Rep. 89; monographic note to Hurst v. Warner, 47 Am. St. Rep. 545, on quarantine and health laws and regulations; although it is by law empowered to declare what shall be a nuisance: Note to Harmison v. Lewiston, 46 Am. St. Rep. 895. Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which, in fact, is clearly not one, but in doubtful cases depending upon a variety of circumstances requiring judgment and discretion their action is conclusive: Notes to Ex parte Lacey, 49 Am. Dec. 96; Walker v. Jameson, 49 Am. Dec. 232.

MUNICIPAL CORPORATIONS—NUISANCES—LAWFUL BUSINESS—SALE OF SECONDHAND CLOTHING.—A business will not be enjoined as a nuisance unless it inflicts on the complainant a real and substantial injury: Price v. Grantz, 118 Pa. St. 402; 4 Am. St. Rep. 601, and note. Municipal authorities having power to abate nuisances cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when it is so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. Hence, an ordinance purporting to prohibit any person from selling or otherwise dealing in second-hand or castoff garments, blankets, or bedding, except that which has been imported, is invalid: See monographic note to Hurst v. Warner, 47 Am. St. Rep. 542, on quarantine and health laws and regulations.

CASES
IN THE
SUPREME COURT
OF
OREGON.

EX PARTE MASON.

[29 OREGON, 18.]

LIBEL.—MORAL TURPITUDE is necessarily involved in the willful publication of a libel.

AN ATTORNEY MAY BE DISBARRED OR SUSPENDED upon his conviction of the publication of a libel as the managing editor of a newspaper, if the statute authorizes such disbarment upon his being convicted of a misdemeanor involving moral turpitude. Such conviction is conclusive evidence against him.

ATTORNEYS—EXAMINING RECORD OF CONVICTION OF.—In a proceeding for the disbarment of an attorney because he has been convicted of the publication of a libel, the court may go behind the record for the purpose of determining upon the extent or severity of the punishment to be administered. If it appears from such record that he has suffered the penalty attached to the conviction, and that he was probably not cognizant of the libel until after the paper in which it was issued had been published and circulated, he being the managing editor and not the writer of the libelous article, the court may, instead of disbarring, merely suspend him for a time designated.

O. P. Mason was both an attorney at law and the managing editor of a newspaper. He was indicted, tried, and convicted of the crime of libel in publishing a libelous article, and his conviction was sustained by the supreme court in *State v. Mason*, 26 Or. 273; 46 Am. St. Rep. 629. Thereafter an information was filed against him in the supreme court alleging such conviction and that the crime of which he was convicted was a misdemeanor involving moral turpitude. He in his answer denied that the misdemeanor involved moral turpitude, and alleged that he was found guilty by construction of law only, which rendered the manager, editor, or owner of a newspaper criminally liable for

the publication of a libel, though he did not write the article and had no knowledge of it prior to its publication; that he did not write the article in question, nor know of its publication until after the paper in which it was printed was circulated. The testimony taken in this case showed that the accused was not the writer of the libelous article, and also strongly tended to prove that he had no knowledge of it until after its publication.

C. M. Idleman, attorney general, and F. A. E. Starr, for the motion to disbar.

O. P. Mason, in pro. per.

21 PER CURIAM. 1. The answer impliedly admits the conviction, the record of which is made a part of the evidence submitted, and, this being conclusive thereof, necessitates an interpretation of the term "moral turpitude." Mr. Newell, in his work on Defamation, Slander, and Libel, section 12, in speaking of the term, says: "Moral turpitude may, therefore, be defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." In actions of libel and slander, moral turpitude has been held to have been involved by imputing to another the commission of the following crimes: Abortion: *Filber v. Dautermann*, 26 Wis. 518; *Bissell v. Cornell*, 24 Wend. 354; *Widrig v. Oyer*, 13 Johns. 124; adultery: *Ranger v. Goodrich*, 17 Wis. 80; bribery: *Hoag v. Hatch*, 23 Conn. 585; burglary: *Alfele v. Wright*, 17 Ohio St. 238; 93 Am. Dec. 615; forgery: *Alexander v. Alexander*, 9 Wend. 141; fornication: *Pollard v. Lyon*, 91 U. S. 225; keeping a bawdy-house: *Martin v. Stillwell*, 13 Johns. 275; 7 Am. Dec. 374; larceny: *Redway v. Gray*, 31 Vt. 292; *Perdue v. Burnett*, Minor, 138; libel: *Andres v. Koppenheaver*, 3 Serg. & R. 254; 8 Am. Dec. 647; **22** removing boundary marks: *Young v. Miller*, 3 Hill, 21; *Dial v. Holter*, 6 Ohio St. 228. It has been assumed, also, by way of argument, that moral turpitude is not involved in the commission of the following misdemeanors: Assault and battery, breaches of the peace, forcible entry and detainer, trespass, and sales of intoxicating liquor without a license: *Redway v. Gray*, 31 Vt. 292; *Smith v. Smith*, 2 Sneed, 473; *Andres v. Koppenheaver*, 3 Serg. & R. 254; 8 Am. Dec. 647. No unintentional wrong or improper act, innocent in purpose, can involve moral turpitude: *Pullman Palace Car Co. v. Central Transp. Co.*, 65 Fed. Rep. 158. The term lacks precision, and necessitates the examination of the

works of moral and ethical authors, rather than the text-books of legal writers, to ascertain whether a given case falls within or without the rule: *Skinner v. White*, 1 Dev. & B. 471; *Birch v. Benton*, 26 Mo. 153. In *Parkersburg v. Brown*, 106 U. S. 487, Mr. Justice Blatchford, commenting upon an ultra vires contract, says: "The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received." So too in *Spring Co. v. Knowlton*, 103 U. S. 49, Mr. Justice Woods, commenting upon a similar contract, says: "It is to be observed that the making of the illegal ²³ contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud." "This element of moral turpitude," says Lowrie, J., in *Beck v. Stitzel*, 21 Pa. St. 522, "is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community." An assault and battery is a crime *malum in se*, the commission of which rarely involves moral turpitude: *McCuen v. Ludlum*, 17 N. J. L. 12. It is apparent from the foregoing authorities that the term is vague, and that "moral turpitude" is involved only when so considered by the state of the public morals, and hence it might be applied in some sections and denied in others, thus rendering a satisfactory definition of the term difficult if not impossible. Inability to properly define the term, however, does not preclude us from saying that it is, and of necessity must be, involved in the willful publication of a libel. The case of *Andres v. Koppenheaver*, 3 Serg. & R. 254, 8 Am. Dec. 647, was an action for slander, founded upon the following language: "What is a woman that makes a libel? She is a dirty creature, and that is you. You have made a libel, and I will prove it with my whole estate." It was held that the crime of libel imputed to the plaintiff involved moral turpitude, Tilghman, C. J., saying: "The man who wantonly, maliciously, and falsely traduces the character of his neighbor is no better than a felon; ²⁴ he endeavors to rob him of that in comparison with which gold and diamonds are but dross." We think there can be no doubt that the willful publication of a malicious libel by the manager of a newspaper, when made either to vent his spleen upon

the object of his wrath, or to cater to the perverted taste of a small portion of the public, clearly involves moral turpitude, and manifests on the part of the libeler a depraved disposition and a malignant purpose.

2. The statute prescribes and enumerates the causes which may subject an attorney to the penalty of removal or suspension. Hill's Code, section 1047, provides that "an attorney may be removed or suspended by the supreme court for either of the following causes, arising after his admission to practice: 1. Upon his being convicted of any felony or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence; 2. For a willful disobedience or violation of the order of a court requiring him to do or forbear an act connected with or in the course of his profession; 3. For being guilty of any willful deceit or misconduct in his profession; 4. For a willful violation of any of the provisions of section 1038." This last section prescribes the duties of an attorney. Here is a statutory regulation of the power of the court to strike an attorney's name from the roll. The power itself exists inherently, and independent of the statute, and "is necessary for the protection of the court, the proper administration of ²⁵ justice, the dignity and purity of the profession, and for the public good and the protection of clients": Weeks on Attorneys, 154. A proceeding for disbarment is quasi criminal in its nature (Thomas v. State, 58 Ala. 365; State v. Tunstall, 51 Tex. 81), and the statute has fixed the penalty at removal or suspension. While the court must necessarily have a wide discretion in fixing the extent of the punishment to be administered, yet conviction in this court in a proceeding like this must be followed by the penalty, as in ordinary criminal cases in other courts after a verdict of guilty by the jury.

3. Now, as regards the case at bar, the defendant has been convicted of a misdemeanor, and, as has been shown, one involving moral turpitude. The record of his conviction is made conclusive evidence thereof, so that the production of such record established his guilt in the disbarment proceedings. The court may, however, go behind the record for the purpose of determining upon the extent or severity of the punishment to be administered. To illustrate, we quote from Lord Esher, M. R., in *In re Weare*, 62 L. J., N. S., 601, a recent case from England: "Where a man has been convicted of a criminal offense, that, prima facie at all events, makes him a person unfit to be a member of an honorable profession. You must not carry that to the length of

saying that, wherever he has committed a criminal offense, the court is bound to strike him off for that. . . . Baron Pollock held, and Mr. Justice Manisty held that although ²⁶ his being convicted of a crime *prima facie* made him liable to be struck off the rolls, yet the court still had a discretion, and must inquire into what kind of crime it was of which he had been convicted, and that the court might punish him to a less extent than if he had not been so punished. As to striking off the rolls, I have no doubt myself that the court might say, 'Under these circumstances, we shall do no more than admonish him'; or the court might say, 'We shall do no more than admonish him and make him pay the costs of the application'; or the court might suspend him, or the court might strike him off the rolls. The discretion of the court in each particular case is absolute." In that case the court was apparently possessed of a wider discretion than we are here, as it extended to an admonishment of the attorney. Here the penalty is removal or suspension, with full discretion as to which shall be adopted, and, if the latter, then as to the duration and limitation thereof. So we look behind the record here for the purpose only of determining the punishment that should be inflicted. The fact that the defendant has been convicted in the criminal action, and suffered the penalty thereto attached, and that, in amelioration of the crime for which he was convicted, he has shown that he was only nominally editor of the Sunday Mercury, which contained the libelous publication, and was, perhaps, not cognizant of the contents or insertion of the article until after that number of the paper had been issued, has had large influence with us in softening the penalty incurred. Yet the character of the ²⁷ newspaper with which he allowed his name to be associated was calculated to warn him that he might at any time be subjected to just such a prosecution, and is not such as to commend him for the imposition of a punishment merely nominal. The judgment of the court will therefore be, that he be suspended from practicing as an attorney in all the courts of the state for the term of six months; that the state recover of the defendant the costs and expenses of this proceeding, and that the same be paid by the state in the first instance.

Sentence of suspension.

ATTORNEYS AT LAW—DISBARMENT — CONVICTION OF SLANDER.—Attorneys, who were also editors of a newspaper, published in the paper a libelous article charging a judge with prostituting the machinery of justice to serve party purposes in a certain case; thereupon disbarment proceedings were instituted against them; it was held that they were not guilty of such misbehavior in

office as would subject them to disbarment: *Ex parte Steinman*, 95 Pa. St. 220; 40 Am. Rep. 637. In the notes to the following cases the question as to whether an attorney can be disbarred for crime or misbehavior unconnected with his profession is discussed: *Delano's case*, 42 Am. Rep. 557; *In re Philbrook*, 45 Am. St. Rep. 74; *Burns v. Allen*, 2 Am. St. Rep. 850; *State v. Kirke*, 95 Am. Dec. 335.

HEINTZ v. BURKHARD.

[29 OREGON, 55.]

STATUTE OF FRAUDS.—A contract to manufacture iron-work upon a special order and according to a particular design, and not such as is manufactured for the general trade in the ordinary course of the manufacturer's business, is not within the statute of frauds.

Action to recover damages for the breach of a contract whereby the plaintiff agreed to manufacture certain ironwork to be used in a building about to be erected by the defendant. The defendant, before any work was performed, refused to allow plaintiff to proceed. The work contracted for was not of the kind manufactured by the plaintiff in the usual course of his business, but was of special designs and measurements, suitable only for use in the construction of defendant's building. The trial court held that the contract was an agreement for the sale of personal property, and, not being in writing, that it was void, within the meaning of subdivision 5 of section 785 of Hill's Code, which declares that every agreement for the sale of personal property at a price not less than fifty dollars, unless the buyer accept and receive some part of the personal property, or pay at the time some part of the purchase money, is void, unless the same, or some part thereof, expressing the consideration, is in writing subscribed by the party to be charged with his lawfully authorized act.

William T. Muir, for the appellant.

Paxton & Beach, for the respondent.

59 BEAN, C. J. To determine whether a given contract concerning personal property, which does not exist in specie at the time it is entered into, but must be manufactured and brought into being under the contract, comes within the statute of frauds, is not without difficulty, and the decisions are by no means reconcilable. The chief difficulty in all such cases is encountered in determining when the contract is substantially for the sale of personal property to be executed in the future, and when for work and labor and material only. If the former, it is within the statute; if the latter, it is not. Thus far the authorities, ex-

cept in the state of New York, are substantially agreed; but there have been numerous decisions and much diversity and even conflict of opinion in relation to a proper rule by which to determine whether a contract is, in fact, for the sale of personal property, and therefore within the statute, or for work and labor and material furnished, and so without the statute. There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested, the rule seems to have been settled in *Lee v. Griffin*, 1 Best & S. 272, that: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and ⁶⁰ labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In that case, the action was brought by a dentist to recover twenty-one pounds for two sets of artificial teeth made for the defendant's testatrix. The court held the contract to be for the sale of chattels, and within the statute. But this decision seems to stand alone, and is in direct conflict with the previous decisions of the English courts: *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burr. 2101; *Rondeau v. Wyatt*, 2 H. Black. 163; *Cooper v. Ellston*, 7 Term Rep. 14; *Groves v. Buck*, 3 Maule & S. 178; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surman*, 9 Barn. & C. 574. It is said to have been the result of Lord Tenterden's act, which expressly extended the statute to all contracts of sale, notwithstanding the goods "may not at the time of such contract be actually made, procured, or produced, or fit or ready for delivery, or some act may be required for the making or completing thereof to render the same fit for delivery": *Meinke v. Falk*, 55 Wis. 432; 42 Am. Rep. 722; *Benjamin on Sales*, 6th ed., 108. In this condition of the English authorities, we are not prepared to go to the full extent of *Lee v. Griffin*, 1 Best & S. 272. It is an extreme case, and unless the decision was made to conform to Lord Tenterden's act, it antagonizes the opinions of some of the most eminent jurists of England, and is open to the objection that it practically permits the fraud which, theoretically, the statute seeks to ⁶¹ prevent. To say that a contract of a dentist to manufacture and furnish a set of false teeth for his customer is "an agreement for the sale of personal property" within the meaning of the statute is certainly giving it

the widest possible operation, and has not found general recognition in this country as a correct exposition of the doctrine, although the simplicity of the rule has commended it to many of the judges.

In New York, the rule prevails that a contract concerning personal property not existing in *solido* at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer, and the like, is not within the statute: *Crookshank v. Burrell*, 18 Johns. 58; 9 Am. Dec. 187; *Downs v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 48 N. Y. 17; 8 Am. Rep. 517; *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619; *Higgins v. Murray*, 73 N. Y. 252. But this rule seems to be peculiar to that state.

By the Massachusetts rule, the test is not the existence or non-existence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for trade, or as the result of a special order and for special purposes. If the ⁶² former, it is regarded as a contract of sale, and within the statute; if the latter, it is held to be essentially a contract for labor and material, and therefore not within the statute. Thus, it is held that an agreement to build a carriage of a certain design is not within the statute: *Mixer v. Howarth*, 21 Pick. 205; 32 Am. Dec. 256; but that a contract to buy a certain number of boxes of candles at a fixed price, which the vendor said he would thereafter finish and deliver, is a contract of sale to which the statute applies: *Gardner v. Joy*, 9 Met. 177. The result of the decisions in that state has recently been stated thus: "A contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufacturers or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute": *Ames, J.*, in *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112. And this doctrine seems to be the one most widely adopted in this country. As to the latter part of the rule, relating to goods made on special orders, there is little, if any, conflict in the American

cases: *Baker on Sales*, sec. 96; 2 *Schouler on Personal Property*, sec. 443; *Browne on the Statute of Frauds*, sec. 308; 8 *Am. & Eng. Ency. of Law*, 707; *Flynn v. Dougherty*, 91 *Cal.* 669; *Meincke v. Falk*, 55 *Wis.* 427; 42 *Am. Rep.* 722; *Finney* ⁶³ *v. Apgar*, 31 *N. J. L.* 266; *Phipps v. McFarlane*, 3 *Minn.* 109; 74 *Am. Dec.* 743; *Hight v. Ripley*, 19 *Me.* 137; *Cason v. Cheely*, 6 *Ga.* 554; *Abbott v. Gilchrist*, 38 *Me.* 260.

Until legislation shall assert itself more positively, the courts are put to their election as between these three rules, which, though each has its own merits, are not to be reconciled with one another. In the absence of a statute substantially the same as Lord Tenterden's act, we are unwilling to go to the extent of the doctrine of *Lee v. Griffin*, 1 *Best & S.* 272, and in this case it is unnecessary for us to give a preference to either the New York or Massachusetts rule, because the contract in question is valid under either. It would be excluded from the operation of the statute by the rule adopted in New York, because the subject matter of the contract did not exist in solido, or at all, at the time it was made; and it is not within the statute under the Massachusetts rule and the generally accepted American doctrine, because the ironwork was to be manufactured especially for the defendant, and upon his special order, according to a particular design, and was not such as the plaintiffs, in the ordinary course of their business, manufactured for the general trade. It follows that, under either view, the court below was in error in holding that the contract was void because not in writing. The judgment must, therefore, be reversed, and a new trial ordered.

Reversed.

STATUTE OF FRAUDS—CONTRACT TO MANUFACTURE, WHETHER WITHIN.—A contract for the sale of articles to be prepared for delivery by work and labor, where the work and labor are a part of the contract, is not within the statute of frauds: *Eichelberger v. McCauley*, 5 *Har. & J.* 213; 9 *Am. Dec.* 514, and note. An agreement to manufacture an article is not a sale within the statute of frauds: *Mixer v. Howarth*, 21 *Pick.* 205; 32 *Am. Dec.* 256, and note; *Meincke v. Falk*, 55 *Wis.* 427; 42 *Am. Rep.* 722; *Goddard v. Binney*, 115 *Mass.* 450; 15 *Am. Rep.* 112; *Parsons v. Loucks*, 48 *N. Y.* 17; 8 *Am. Rep.* 517; *Warren etc. Mfg. Co. v. Holbrook*, 118 *N. Y.* 586; 16 *Am. St. Rep.* 788, and note; *Bird v. Muhlinbrink*, 1 *Rich.* 199; 44 *Am. Dec.* 247; *Crookshank v. Burrell*, 18 *Johns.* 58; 9 *Am. Dec.* 187, and extended note: See, also, the extended note to *Pawelski v. Hargreaves*, 54 *Am. Rep.* 164.

FRAME v. SLITER.

[29 OREGON. 121.]

VENDOR'S LIEN.—A grantor of real estate by a deed absolute who delivers possession to his vendee has not an implied lien on the real estate granted for unpaid purchase money.

Joseph B. Thompson, for the appellants.

N. W. Barrett and Loring K. Adams, filed a brief as amici curiae.

122 BEAN, C. J. The single question in this case is, whether a grantor of real estate by absolute deed, followed by delivery of possession to his grantee, has an implied equitable lien thereon for the unpaid purchase money. It has been several times mooted in this court, but the doctrine of the English court of chancery, which recognizes and upholds such lien, has never been recognized or established here, although the state is classed by many text-writers among those in which the lien prevails. The earliest case in which reference is made to the question, and the one most strongly relied upon to sustain the doctrine, is *Pease v. Kelly*, 3 Or. 417, but the court in that case only decided that by taking a mortgage to secure the payment of purchase money the vendor waived the equitable lien, and, therefore, could not maintain the suit. Nothing more was in fact decided in that case, although it is stated in the opinion that "the lien exists if there is no higher security." It is next referred to in *Kelly v. Ruble*, 11 Or. 75, ¹²³ where the court, after disposing of the case on other grounds, say: "We have thus far impliedly admitted the existence of the equitable lien of a vendor of real estate for the unpaid purchase price. But we doubt the actual existence of the lien in this state: *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; *Kauffelt v. Bower*, 7 Serg. & R. 64; 10 Am. Dec. 428. It is not believed the existence of such a lien was decided in *Pease v. Kelly*, 3 Or. 417." The question again arose in *Gee v. McMillan*, 14 Or. 268, 58 Am. Rep. 315, and Mr. Justice Strahan puts his decision in that case squarely on the doctrine of the existence of a grantor's lien, but Chief Justice Lord dissents in toto, and Mr. Justice Thayer, while concurring in the result upon other grounds, expressly disclaimed any intention to decide whether the principles upon which the doctrine is supposed to be founded are broad enough "to uphold a vendor's lien to the extent of raising a trust in favor of a grantor, who has conveyed by deed of absolute conveyance, so as to admit of the purchase price

being made a charge upon the property conveyed, in an ordinary case of sale of real estate." In *Lewis v. Henderson*, 22 Or. 548, *Thomas v. Thomas*, 24 Or. 254, and *Jones v. Gates*, 24 Or. 415, where the doctrine is again referred to, the court carefully avoided approving it even by inference. From these decisions it is apparent that it has never received judicial sanction, or become a law of real property in this state, and its decision is now made necessary for the first time. We therefore feel at liberty to determine the question as one of first impression, ¹²⁴ and, after having given it the careful and deliberate consideration which its importance demands, we are clearly of the opinion that the doctrine of a grantor's lien is so opposed to the general policy and course of legislation in this state that it ought not to prevail here. The whole tenor of our legislation is to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer by discouraging all secret or latent equities, and requiring all conveyances thereof and encumbrances thereon to be made a matter of public record.

The doctrine seems to have been borrowed by the English courts of chancery from the civil law, as a means of evading the rule of the common law under which land was not liable both during and after the life of the debtor, for simple contract debts, and, after the reason for its original adoption had ceased to exist, was enforced upon the ground that the previous decisions had "the effect of contract, though no actual contract had taken place": *Mackreth v. Symmons*, 15 Ves. Jr. 329. Many of the courts of this country, following the English cases, have adopted the rule; but they have never been able, in our opinion, to place the doctrine upon any satisfactory principle applicable to the condition of affairs in a country where real estate is one of the principle articles of commerce, and liable for the debts of the owner, and in which a system of registration prevails. The doctrine has been variously stated to rest upon natural equity, a supposed intention of the parties, a trust arising out of the vendee's ¹²⁵ holding the land without paying the price, the implied agreement of the parties, and an equitable mortgage, because there is no pretense in such cases that there was any agreement for security on the land, which is essential to an equitable mortgage; nor can it be supported as a trust, for a constructive trust cannot arise from the mere breach of a contract to pay money in the absence of fraud; nor on the ground of an implied agreement, because, as said by Mr. Justice Gibson, in *Kauffelt v. Bower*, 7 Serg. & R. 76, 10 Am. Dec. 428: "The implication that

there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention is, in almost every case, inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." Nor do we think it can now be put upon the natural equity "that a person having got the estate of another shall not, as between them, keep it and not pay the consideration," because there is no reason for a resort to equity in this country, where real estate is liable to seizure upon attachment and execution, and the courts of law afford a creditor a speedy remedy for the enforcement of his claim. And, besides, "It is inconsistent with natural justice," quoting again from Mr. Justice Gibson in the case referred to, "that a vendor, who publishes to the world by the terms of his deed that he has parted with his whole interest, and has trusted to the personal security of the vendee, should become the object ¹²⁶ of special protection against the consequences of his own negligence, and that, too, at the expense of a third person, who, in purchasing from the vendee, even with notice that the purchase money was unpaid, has been guilty of nothing positively immoral or even unconscionable." If a vendor sells and conveys real estate, and, either through negligence or even confidence, chooses to rely upon the personal security of his vendee for the purchase money," he has no special claim to the aid of a court of equity to protect him from the consequences of his own act, by enforcing some secret lien which, in the nature of things, could be known only to himself and his vendee and such persons as they might take into their confidence, a practice which, if tolerated, would have a tendency to open wide the door to fraud and perjury.

The earliest English case which contains a full discussion of the doctrine and the reason and authorities by which it is supported is *Mackreth v. Symmons*, 15 Ves. Jr. 329. In that case Lord Eldon was only able to determine that two points were clearly settled: 1. That, generally speaking, there is such a lien; and 2. That in those general cases in which there would be a lien as between vendor and vendee, the vendor will have a lien against a third person with notice that the money was not paid. But, as to what would be sufficient to make a case in which the lien would not exist, he felt obliged to declare from the authorities that it was "obvious that the vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he ¹²⁷ shows his purpose, cannot know the situation in which he stands

without the judgment of a court how far that security does contain the evidence, manifest intention, or declaration plain upon that point," and that "it has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that the purchaser might be able to know, without the judgment of a court, in what cases it would, and in what cases it would not, exist." And, although the doctrine of the English court of chancery has been the subject of much learned discussion in this country, it is no more satisfactory now than in Lord Eldon's time. Indeed, it is much less so. From the very nature of the lien itself there can be no fixed rules concerning it. It is "a mere creature of a court of equity, which it molds and fashions according to its own purposes," and "has no existence until it is established by the decree of a court in the particular case; and is then made subservient to all other equities between the parties": Story, J., in *Gilman v. Brown*, 1 Mason, 191. And Mr. Justice Potter says "its existence depends upon, and is controlled by, no stated rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the peculiar case, that is, whether or not a case of natural equity is established; and, if so, whether it is not made to ¹²⁸ yield to higher or superior equities in some other person—whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity, or whether, by the acts or omissions to act, or by the neglect of the party claiming such lien, to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands: *Fisk v. Potter*, 2 Keyes, 64.

Under the authorities, it would seem that, where the doctrine prevails, each case must be determined upon its own peculiar circumstances, according to the views of the chancellor and the weight of argument at the bar; so that it is impossible to tell, without the judgment of a court, whether the lien does or does not exist. It may be well doubted whether any subject connected with the American law of real property has provoked more judicial discussion and controversy, and is now in a more chaotic state, than the doctrine of a grantor's lien, where such lien is held to exist. There is hardly a rule upon the subject which has not been somewhere denied, and hardly any two states agree upon the essential points of the doctrine. "No other single topic

belonging to the equity jurisprudence," says Mr. Pomeroy, "has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver, or discharge, the parties against whom it avails, and the parties in whose favor it exists, the ¹²⁹ decisions in different states and sometimes even in the same state, are directly conflicting. It is practically impossible to formulate any rules representing the doctrine as established throughout the whole country": 3 Pomeroy's Equity Jurisprudence, sec. 1251. Indeed, the remark attributed to Lord Mansfield, that "the more we read the more we shall be confounded," is peculiarly applicable to the condition of the law upon this question. It has been adjudged that the lien does not exist under any circumstances after an absolute conveyance by such able jurists as Mr. Justice Gray of Massachusetts, now of the supreme court of the United States, Gibson of Pennsylvania, Nash and Ruffin of North Carolina, Crozier of Kansas, Shipley of Maine, and Maxwell of Nebraska, to whose opinions in *Kauffelt v. Bower*, 7 Serg. & R. 64; 10 Am. Dec. 428; *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; *Womble v. Battle*, 3 Ired. Eq. 183; *Simpson v. Munde*, 3 Kan. 172; *Philbrook v. Delano*, 29 Me. 410; *Edminster v. Higgins*, 6 Neb. 265, we refer for arguments which seem to us conclusive against the existence of such a lien. In some of the states, it has been adopted by the courts and afterward abolished by the legislature; and in others, although the courts have felt bound to follow earlier cases, it has of late years been done with expressions of regret that such liens were ever admitted in this country, where registration is so generally provided for and practiced.

In courts of the United States, the doctrine has been recognized where established by the local laws ¹³⁰ of different states: *Rice v. Rice*, 36 Fed. Rep. 858; but it does not seem to have been looked upon with favor if we may judge from the remarks of Mr. Chief Justice Marshall in *Bayley v. Greenleaf*, 7 Wheat. 51, that "it is a secret invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world the vendee appears to hold the estate, divested of any trust whatever, and credit is given to him, in the confidence that the property is his own, in equity as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice to the world. If he does not, he is, in some degree, accessory to a fraud committed on the public, by an act which exhibits the vendee as a complete owner of an estate on which he

claims a secret lien." The authorities pro and con are collated in 28 American and English Encyclopedia of Law, 163; 3 Pomeroy's Equity Jurisprudence, sec. 1251; 2 Jones on Liens, sec. 1061; 1 Beach on Modern Equity Jurisprudence, secs. 296, 297, and note to Mackreth v. Symmons, 1 Lead. Cas. Eq. 447, and we think an examination of them and the discussion of the question by the several authors will clearly show that the whole doctrine is inconsistent with the general policy prevailing in this country of making all matters of title dependent upon record evidence, so that interested parties may know whether the land is encumbered by lien without waiting for the judgment of a court, as is admittedly the case in many instances where a grantor's lien exists; that it bristles with difficulties, ¹³¹ snares, and dangers, and ought not to find lodgment in this state, where its only effect would be to render the title to real estate uncertain, embarrass its alienation, foster litigation, and offer temptation to fraud and perjury, with no substantial benefit to anyone, except to protect some grantor from the consequences of his own voluntary act. The decided tendency of modern legislation and legal learning is clearly against the existence of such a lien under any circumstances. Mr. Pomeroy ventures the opinion "that the original grounds and reasons for admitting the grantor's lien do not exist in our own country, and the lien itself is not in harmony with our general real property law. The tendency both of our legislation and of our social customs is to make land a subject of commerce, and its transmission as free as possible; while the rights of grantors can be fully protected by mortgages which, in nearly all the states, are widely different from the instrument bearing the same name in England": 3 Pomeroy's Equity Jurisprudence, sec. 1250, note. And Mr. Jones says that "it is to be noticed that, within a few years, several states have abolished this implied lien, and that strong expressions of disapprobation of the doctrine have been used in others. Moreover, the practical tendency in the older states is to rely upon formal instruments for security when security is wanted. It may be doubted, therefore, whether this doctrine will long survive": 2 Jones on Liens, sec. 1063, note. And the learned editors of the Leading Cases in Equity, upon an exhaustive review of the authorities, conclude that "there can ¹³² be little doubt this principle of an implied lien for purchase money has no just application in a country where every debt may be at once made a lien by judgment, and where debts generally are a lien on the lands of decedents; and that the courts of those states which

have wholly expelled the doctrine have exhibited a more accurate appreciation of its nature and purpose than those which have retained it": 1 Lead. Cas. Eq. 502. The doctrine may have been less objectionable in a country where land was not liable for the contract debts of the owner although incurred in its purchase, and where the policy of the law was to discourage the alienation of real estate. But we are satisfied that it is repugnant to the registration law and general policy of this state, and is no part of our law.

The decree of the court below will be affirmed.

VENDOR'S LIEN.—In Massachusetts, the vendor of real estate by an absolute deed has no lien thereon for the unpaid purchase money, in the absence of a written agreement of the parties to that effect: *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449. See, also, *Kauffelt v. Bower*, 7 Serg. & R. 64; 10 Am. Dec. 428, and note, and the note to *Burgess v. Fairbanks*, 17 Am. St. Rep. 232.

JOHNSON v. HIBBARD.

[29 OREGON, 184]

SALE OF GOODS TO BE MANUFACTURED, TITLE WHEN VESTS.—If goods are ordered to be manufactured, the title vests in the purchaser when the goods are manufactured and delivered to a common carrier consigned to him, if they are manufactured as ordered.

SALE.—IF GOODS TO BE MANUFACTURED do not when manufactured conform in quantity and quality with the specifications of the order for them, the title thereto does not vest in the purchaser or person ordering them until his acceptance of them.

SALE—ACCEPTANCE.—WHETHER GOODS MANUFACTURED UPON AN ORDER given for them, but which do not correspond to the specifications of the order, have been accepted so as to vest title in the purchaser and render him liable for the purchase price is a question of fact to be determined by the jury from all the evidence, where it appears that such goods were delivered to a common carrier, and were received by the purchaser, who did not notify the vendor of his objection to the goods and of his intention not to accept them until some weeks after their receipt.

Action to recover for goods sold and delivered. The testimony tended to show that the defendant, residing in Oregon, ordered of the plaintiff at New York certain boots and shoes, to be manufactured for the defendant and to correspond with certain exhibited samples; that plaintiff shipped goods claiming that they had been manufactured to correspond with the order, the shipment being in two lots, one on December 31, 1890, and the other on March 28, 1891. The shipments were received by the defendant on January 30, and April 21, 1891, he paying freight and cartage. The first lot of goods was placed on the shelves of the de-

fendant, and kept there by him for sale for some two or three months. The second lot was never examined by the defendant, though he retained possession thereof up to the time of the trial. March 22, 1891, the defendant wrote to the plaintiff stating that the goods were narrower than those he had ordered, and that he held them subject to the plaintiff's order, and that the balance of the order might be canceled, adding that he would try to sell enough to try and pay the freight bill if the plaintiff said so. March 30th, the plaintiff answered, stating that the second shipment had started before the receipt of the defendant's letter. April 25th, the defendant again wrote that the goods did not fill the requirements of his order, specifying certain objections to them, and saying: "I will try to use the French kid, if agreeable to you, although the vamps being of the old style, they will go slow. But to accept the others I will not, and will turn them over to whom you may designate, or ship them back to you." Among the instructions given by the court to the jury was the following: "Now the question here is, whether these acts that have been shown here amount to a receipt and acceptance of these goods, or whether they do not. I submit the question to you along with the evidence, these letters, etc., that have been read, whether the defendant within a reasonable time repudiated this contract of sale alleged by the plaintiffs." The court also explained to the jury the right of the purchaser to disclaim the sale and to reject the goods, adding: "I submit this question to you, whether, under all these letters that are written by the parties, there was reasonable diligence in disclaiming the sale." The jury returned a verdict in favor of the plaintiff. The defendant in his assignment of error objected to the instructions heretofore quoted, on the ground that there was no testimony tending to show an acceptance of the second lot of goods, and that the language of the court implied that the defendant was liable unless he could show an affirmative defense, whereas it was incumbent on the plaintiff to show an acceptance by the defendant.

George G. Gammans, for the appellant.

Arthur C. Emmons, for the respondent.

¹⁸⁷ WOLVERTON, J. In the sale of articles or goods to be manufactured, it is clear that no title passes to any specified articles or designated lot of goods until their manufacture is completed, and they, by the understanding and consent, express or implied, of the parties to the sale, have been selected or designated, and set apart to the purchaser. The contract for such a sale, like

a contract for the sale of goods not specified, is executory in its nature, and it does not become a complete bargain and sale until the identical goods to which the contract is to attach are specified or appropriated to its purposes. It seems the only question that there is any difficulty in determining is as to when the appropriation takes place. Where a simple order is given to a dealer for goods of certain quality and quantity, there is an implied ¹⁸⁸ assent that the dealer shall make the selection, and the exact point in the act of making such selection when the dealer is no longer at liberty to change his intention may be designated as the time when the title vests in the purchaser. Mr. Benjamin says: "The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and, when once he has done that act, the election has been irrevocably determined, but till then he may change his mind": Benjamin on Sales, sec. 359. Applying the rule to the case at bar, the title would pass when the goods were manufactured and delivered to the common carrier consigned to the defendant, if made as ordered, and especially would it be so when received by the consignee: *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295; *Brewer v. Michigan Salt Assn.*, 47 Mich. 526; *Martz v. Putnam*, 117 Ind. 392, 400. There is some conflict in the authorities as to whether the same rule applies to a sale of goods to be manufactured as to a sale of goods not specified, but it is believed the weight of authority is in favor of the doctrine that it is alike applicable to the one case as to the other: 21 Am. & Eng. Ency. of Law, 494, 505. But, in order that the title may pass at this juncture of the transaction, the goods must conform as to quantity and quality with the specifications of the order: See ¹⁸⁹ *Brigham v. Hibbard*, 28 Or. 386. If they did not so correspond, then an acceptance by the purchaser would be necessary to complete the sale, otherwise not. This case seems to have been tried in the court below upon the theory that the goods did not fill the measure of the order, as it would appear to have turned upon the question as to whether there had been an acceptance by the defendant. He does not question the plaintiff's contention that the facts show an unqualified acceptance of the first shipment, but claims the evidence does not warrant a finding that the last consignment was so accepted. It was argued that the court should have distinguished between the two consignments upon

the question of acceptance, but no such instruction was asked for, and no error can therefore be predicated upon the court's failure in that respect. We think the court properly instructed the jury touching the question of acceptance, and we cannot see that the limited portion of the instruction excepted to does in any manner cast the burden of proof upon the defendant to show nonacceptance, which is the burden of appellant's contention. Finding no error in the record, the judgment of the court below is affirmed.

SALES OF GOODS TO BE MANUFACTURED—TITLE WHEN VESTS.—Title to manufactured property is changed from the manufacturer to the customer only by the assent of both parties: *Moody v. Brown*, 34 Me. 107; 56 Am. Dec. 640, and extended note; *Rider v. Kelley*, 32 Vt. 268; 76 Am. Dec. 176. In order to maintain an action for the price of articles manufactured to order, it is necessary that they should be manufactured and delivered according to agreement, or delivery tendered, and that they should be accepted by the person ordering: *McIntyre v. Kline*, 30 Miss. 361; 64 Am. Dec. 163.

MEYER v. BROOKS.

[29 OREGON, 203.]

ATTACHMENT.—AN AMENDMENT OF A COMPLAINT which does not change the cause of action asserted in the original, but merely sets it forth with greater detail, does not dissolve the attachment.

ATTACHMENT—OTHER SECURITY.—A motion to discharge an attachment on the ground that the plaintiff has other security will not be granted where the suit is brought upon a judgment foreclosing a mortgage, and the affidavit states that the debt sued on is not secured by any mortgage, lien, or pledge of real or personal property, and it appears that some payment has been made on the judgment. It will be presumed that such payment arose from the sale of the mortgaged premises, and exhausted the plaintiff's security.

JUDGMENT, PERSONAL, WHAT IS.—A judgment in a suit to foreclose a mortgage that the plaintiff have and recover from the defendants, naming them, a sum specified, that the mortgaged premises be sold, and, if the proceeds of the sale should prove insufficient to pay the judgment, that the sheriff specify the amount of the deficiency in his return of sale, and that on the coming in of such return the plaintiff have execution therefor, is a personal judgment upon which an action may be brought against the defendant.

ATTACHMENT IN AN ACTION ON A JUDGMENT.—A judgment is a contract for the direct payment of money within the meaning of the attachment laws. Hence an attachment may properly issue in an action thereon.

JURISDICTION TO RENDER PERSONAL JUDGMENT, SPECIAL APPEARANCE DOES NOT GIVE.—If, in an action against a nonresident in which his property has been attached, and service of summons has been made on him by publication, he appears specially for the purpose of objecting to the jurisdiction of the

court and moving to quash the attachment, the court does not thereby acquire jurisdiction over his person, and cannot render a valid personal judgment against him.

Action on a judgment recovered by the plaintiff against the defendant in the state of Washington. Some time after the filing of the original complaint, the plaintiff filed an amended complaint, which merely set out more in detail than the original the nature and character of the action in which the judgment sued upon was rendered. Before the filing of this amended complaint an attachment had issued. The defendants, being nonresidents of the state, summons was served upon them by publication. They subsequently appeared for the purpose of objecting to the jurisdiction of the court and moving to quash the attachment, on the ground that the complaint upon which it had issued had been superseded by the amended complaint, that the action was not upon "a contract, express or implied, for the direct payment of money" within the meaning of the attachment laws, that it does appear that the judgment sued upon was rendered for the foreclosure of a mortgage, and it does not appear that the mortgage security has been exhausted, and, finally, that no judgment was ever rendered in the original action in favor of the plaintiff and against the defendants. The motion of the defendants was overruled, and a personal judgment entered against them for the amount prayed for in the plaintiff's complaint.

Carey, Idleman, Mays & Webster, and Hammond & Vawter, for the appellants.

Charles A. Cogswell and Carroll & Rhode, for the respondent.

206 BEAN, C. J. 1. The first, third, and fourth grounds of the motion require but little notice. The amended complaint does not change the cause of action stated in the original, and therefore does not operate to discharge or affect the attachment: *Suksdorff v. Bingham*, 13 Or. 369.

2. And, while the amended complaint does not aver that the mortgage security has been exhausted, it does not negative that fact. Besides, the affidavit for the writ of attachment states that the judgment sued on was not secured by any mortgage, lien, or pledge upon real or personal property. For the purpose of the question here presented, it must be assumed, therefore, that the payment alleged to have been made upon the judgment was from the proceeds of the mortgaged premises.

3. The contention that no money judgment was ever rendered against the defendants by the superior court of the state of

Washington is contradicted by the terms of the judgment set out in the complaint, in which it was ordered and adjudged that the ²⁰⁷ plaintiff "do have and recover of and from the defendants Quincy A. Brooks and Lizzie Brooks, and each of them, the sum of eleven thousand and eighty-six dollars, with interest from date, together with his costs and disbursements in this action incurred." The provision that if the money arising from the sale of the mortgaged premises should be insufficient to pay the amount of the judgment, the sheriff should specify the amount of such deficiency and balance due plaintiff in his return of sale, and that "on the coming in and filing of said return the plaintiff may have execution therefor," at most only postponed plaintiff's right to a general execution on his judgment until after the proceeds of the mortgaged property have been exhausted.

4. This brings us to the important question in this case, and that is, whether an action on a foreign judgment is an action on "a contract, express or implied, for the direct payment of money," within the meaning of the attachment laws of this state. That a judgment is a contract has been affirmed and denied with equal confidence: See 1 Freeman on Judgments, sec. 4; Black on Judgments, sec. 7, et seq. But whether, strictly speaking, it is to be regarded as a contract or not, is immaterial to this inquiry, because judgments are properly classified as contracts with reference to actions and remedies upon them: *Childs v. Harris Mfg. Co.*, 68 Wis. 233; *Taylor v. Root*, 4 Keyes, 335; *Stuart v. Lander*, 16 Cal. 372; 76 Am. Dec. 538. And under statutes like the attachment law of this ²⁰⁸ state, which is evidently designed to distinguish between actions *ex contractu* and actions *ex delicto*, a plaintiff in an action on a judgment is entitled to such remedies as are authorized in actions on contracts. Thus, in *Gutta Percha Mfg. Co. v. Mayor*, 108 N. Y. 276, 2 Am. St. Rep. 412, it was held that an action upon a money judgment, whether rendered for a tort or upon a contract, is an action to recover money as damages for breach of "a contract, express or implied," within the meaning of the attachment laws of that state. In that case, Earl, J., speaking for the court, says: "Two kinds of contracts are contemplated by section 635; express contracts, which are such as are voluntarily made by the parties thereto, and implied contracts, which, though not expressly made by the parties, are made by the law when it, enforcing a sound morality and a wise public policy, acting upon principles of equity and justice, imposes upon a party an obligation to pay a debt or discharge a duty. After the recovery of this judgment, whether it

was recovered for a tort or upon contract, the recovery became a debt which the defendant was under obligation to pay, and the law implied a promise or contract on his part to pay it. The previous cause of action, whatever it was, became merged in the judgment. This is not, therefore, an action *ex delicto*, but *ex contractu*; and the plaintiff was entitled to such remedies only as are authorized in actions upon contracts." The same ruling was had in *First Nat. Bank v. Van Vooris*, 62 N. W. Rep. 378, by the supreme court of ²⁰⁹ South Dakota, February 23, 1895, under a similar statute. The manifest design and purpose of the attachment law was to confine the remedy by attachment to actions arising on contract, as distinguished from actions in tort; and, while judgments are not for all purposes to be treated as contracts, there is no authority to the effect that they are never to be so treated. All the authorities recognize the implied legal obligation of every judgment debtor to pay the judgment, and, as to remedies for their enforcement, judgments may be deemed and are regarded as contracts, and within the terms of the statute giving the remedy by attachment "in an action upon a contract, express or implied." We find nothing in the letter or policy of the statute which requires us to hold that an attachment may not issue in an action on a judgment under our statute, and no authority sustaining defendants' contention. We think, therefore, the motion was properly overruled.

5. But the court was in error in rendering a personal judgment against the defendants. Their appearance was for a special purpose, and did not confer jurisdiction of the person so as to authorize the court to proceed to judgment against them: *Belknap v. Charlton*, 25 Or. 41. The judgment of the court below, so far as it rendered a personal judgment against the defendants, is therefore reversed, and in all other respects is affirmed, neither party to recover costs on this appeal.

Modified.

ATTACHMENTS.—WHETHER DISSOLVED BY AMENDMENT OF THE DECLARATION is questioned in *Lowry v. Cady*, 4 Vt. 504; 24 Am. Dec. 628; but the subject of amendment of declarations or complaints in attachment is the subject of the extended note to *Barber v. Swan*, 61 Am. Dec. 125.

ATTACHMENT IN ACTION ON JUDGMENT.—A judgment is a contract "express or implied" within the terms of the statute authorizing the issue of attachments on such contracts, whether it was founded on a contract or a tort: *Gutta Percha etc. Mfg. Co. v. Mayor*, 108 N. Y. 276; 2 Am. St. Rep. 412, and note. A judgment debtor cannot be held as garnishee of a judgment creditor: *Shinn v. Zimmerman*, 23 N. J. L. 150; 55 Am. Dec. 260, and note; *Norton v. Winter*, 1 Or. 47; 62 Am. Dec. 297, and note; *American Bank v. Snow*, 9 R. I. 11; 98 Am. Dec. 364, and note.

WALLOWA NATIONAL BANK v. RILEY.

[29 OREGON, 283.]

PROMISSORY NOTES GIVEN AS RENEWALS OF OTHER NOTES are but evidences of the same indebtedness, and property exempt from execution or attachment for the original notes is equally exempt from the renewals.

A HOMESTEAD UNDER THE LAWS OF THE UNITED STATES IS EXEMPT from seizure and sale for the satisfaction of a debt created after final proof was made, but before the issuing of a patent.

Creditor's bill to subject certain real property to execution. This property had been entered by Levi W. Riley as a homestead under the laws of the United States. He made final proof on the eighth day of October, 1889, and the patent issued November 29, 1891. Between the time of making final proof and receiving the patent he became indebted to the plaintiff on several promissory notes. These notes were renewed from time to time, and upon the last renewal the present action was brought.

Ivanhoe & Sheahan, for the appellant.

A. C. Smith, for the respondent.

²⁹⁰ BEAN, C. J. Substantially the only question for our determination is, whether a homestead under the laws of the United States is liable to seizure and sale for the satisfaction of a debt contracted after final proof and before patent issues. It is true the contention was made at the argument that this case does not come within the provisions of the homestead law, because the notes upon which the action was based were given after the issuance of the patent. But in this view we are unable to concur. The notes in question were simply renewals of other notes, and evidence of an indebtedness contracted long before the date of their execution. The debt for which it is sought to subject the land in question to compulsory ²⁹¹ sale was contracted by Levi Riley at the time the money was borrowed from the bank, and the notes then executed and all subsequent notes made in renewal thereof were but evidence of the same debt. This brings us, then, to the important question in the case. Section 4 of the act of Congress of May 20, 1862, granting homesteads on the public lands (U. S. Rev. Stats., sec. 2296) provides that "no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The literal terms of this section clearly exempt the lands of the homesteader from liabil-

ity for debts which antedate the issuing of the patent. But the contention for the plaintiff is, that in contemplation of law the patent issues when the final proof is made and accepted by the land department, and hence the land is liable for debts contracted thereafter, and this is the view of the supreme court of Colorado: *Struby etc. Mercantile Co. v. Davis*, 18 Colo. 93; 36 Am. St. Rep. 266. So far as the question of title is concerned, this question may be conceded; but the vice of the position, as applied to the case before us, lies in the fact that we are not dealing with title, but with the question of exemption under a valid statute which declares in plain and direct terms that the land granted thereby shall not be liable for debts contracted prior to the happening of a specific event. It has been frequently held that, as between a settler and the government, a vested right to a patent is equivalent to a patent ²⁰² issued, and thereafter the government holds the legal title in trust for the settler, and, when issued, the patent will relate back to the inception of the right of the patentee, when necessary to cut off the rights of intervening claims: *Witherspoon v. Duncan*, 4 Wall. 210; *Stark v. Starrs*, 6 Wall. 402; *Cornelius v. Kessel*, 128 U. S. 456; *Deffeback v. Hawke*, 115 U. S. 392. But this rule is one of title, and has no bearing upon the question of exemption. By the federal constitution Congress is expressly vested with the power of making all needful rules and regulations respecting the public domain, and under this power it may dispose of public lands on such terms and conditions, and subject to such limitations and restrictions, as in its judgment may be deemed advisable, and its decision is conclusive in all other places and before all judicial tribunals: *Gile v. Hallock*, 33 Wis. 523; *Seymour v. Sanders*, 3 Dill. 437; *Russell v. Lowth*, 21 Minn. 167; 18 Am. Rep. 389; *Miller v. Little*, 47 Cal. 348.

In pursuance of this power, and with a view to encourage the settlement of the public domain, Congress has invited heads of families to settle upon small parcels thereof, and make for themselves homes, with the assurance that in no event shall the land become liable to the satisfaction of any debt contracted prior to the issuing of the patent, although, in the mean time, the settler may become the owner of the equitable title. It will thus be seen that questions as to when the period of exemption terminates and when title attaches cannot ²⁰³ be determined by the same rule. The date of the issuing of the patent is made by statute the criterion by which the question of liability is to be determined, and not the condition of the title or the question of

relation as applicable to the holder thereof. It was within the power of Congress to designate any point of time which should fix the period of the exemption of homesteads from sale for antecedent debts, and whether such time should be at or upon the happening of some specific event after the vesting of the equitable title in the settler was a matter of public policy for Congress to determine, and its judgment having been exercised, it is not for the courts to overrule its conclusion by a technical rule of construction. It has, in plain and explicit terms, declared that the land of the homesteader shall not be liable for the debts of the owner or claimant contracted prior to the issuing of the patent, and thus made that date, and not the date of final proof, or the time when a right to a patent accrues, as the point which divides the liability and nonliability of the land. In our opinion, therefore, the land of a homesteader is exempt from liability for all debts contracted prior to the actual issuing of the patent by the government of the United States, whether contracted before or after the date of final proof, and in this conclusion we are supported by a recent well-considered case from the supreme court of California, holding the same doctrine: *Barnard v. Boller*, 105 Cal. 214. The provisions of the homestead law involved here have frequently been the subject of judicial examination ²⁹⁴ and discussion, and although the particular question before us has not been passed on by any of the courts, so far as we can learn, except in the states of Colorado and California, yet the general trend we think of the decisions sustains the view we have expressed: *Miller v. Little*, 47 Cal. 349; *Jean v. Dee*, 5 Wash. 580; *Russell v. Lowth*, 21 Minn. 167; 18 Am. Rep. 389; *Sorrels v. Self*, 43 Ark. 41; *Boggan v. Reid*, 1 Wash. 514; *Gilkerson-Sloss Commission Co. v. Forbes*, 54 Ark. 148; 26 Am. St. Rep. 29; *Baldwin v. Boyd*, 18 Neb. 444; *Seymour v. Sanders*, 3 Dill. 437; *Smith v. Steele*, 13 Neb. 1; *Gile v. Hallock*, 33 Wis. 523. It follows that the decree of the court below must be affirmed, and it is so ordered.

NEGOTIABLE INSTRUMENTS—EFFECT OF RENEWAL NOTES.—The renewal of a promissory note does not satisfy the debt, but merely operates to change the evidence of the debt, and will not destroy rights under it which the statute secures to creditors prior to conveyance: *Lowry v. Fisher*, 2 Bush. 70; 92 Am. Dec. 475, and note. A negotiable note given in renewal of a preceding note is presumed to be in payment of the original demand: *Crooker v. Crooker*, 52 Me. 267; 83 Am. Dec. 509. This decision is contrary to the weight of authority: *Winsted Bank v. Webb*, 39 N. Y. 325; 100 Am. Dec. 435. A negotiable instrument given in renewal of a previous one suspends the right of action on the debt during its currency, or until it is dishonored by non-acceptance or nonpayment: *Bank v. Bridges*, 98 N. C. 67; 2 Am. St. Rep. 317, and note.

PUBLIC LANDS—HOMESTEAD EXEMPTION.—A homestead in public lands, claimed and perfected under the United States statute, is exempt from liability for debts contracted prior to the issuing of the patent therefor: *Faull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836, and note. Lands entered under the United States homestead laws are liable to the satisfaction of debts contracted by the homestead claimant between the date of the final certificate of entry and the date of the patent: *Struby-Estabrook etc. Co. v. Davis*, 18 Colo. 93; 36 Am. St. Rep. 266.

FARMERS' NATIONAL BANK v. SNODGRASS.

[29 OREGON, 395.]

SURETIES, SECURITY TAKEN BY ONE, WHEN ENFORCEABLE IN FAVOR OF ALL.—When one of several sureties, after all have signed and before the debt is paid, obtains from the principal any mortgage or other security for his indemnity, it inures to the benefit of all of the sureties.

SURETIES WHOSE LIABILITIES ACCRUE AT DIFFERENT DATES.—Where several persons are sureties of the same principal, from whom one of them receives a mortgage to indemnify him against his liability on the obligations for which he was then a surety and against such liability as may accrue on his obligations thereafter executed as surety, and he and other persons subsequently become sureties for the principal, the mortgage inures to the benefit of the original sureties whose equities are prior in point of time and are necessarily superior to the equities of persons who became sureties after the mortgage was made.

Suit to foreclose a mortgage executed by William J. Snodgrass, and to determine conflicting claims to the proceeds of a mortgage sale. In July, 1891, Snodgrass made to William and Fred Proebstel a mortgage to indemnify them against liability on certain of his outstanding notes upon which they were sureties, and also to indemnify them from liability on such notes as they might thereafter execute as his sureties. When this mortgage was executed, there existed a note to the First National Bank of Portland on which the Proebstels and the appellant Palmer were joint sureties. He was compelled to pay this note in February, 1894. In January, 1893, the Proebstels and the respondent Predmore executed another note as sureties for Snodgrass, and this latter note Predmore was compelled to pay in April, 1894. The mortgagees afterward assigned the mortgage to the payees of the remaining notes on which they were sureties, who brought this suit, making Palmer and Predmore parties. The trial court entered a decree directing the sale of the mortgaged property and the application of its proceeds, after paying the expenses and costs of suit: 1. To the payment of the amount due plaintiffs; 2.

To the amount due Palmer and Predmore pro rata. From this decree Palmer appealed.

J. H. Slater & Sons, for the appellants.

J. F. Baker, for the respondent.

398 BEAN, C. J. We think the claim of the appellant Palmer is well taken. The rule seems well settled that where one of several sureties, after all had signed, and before the debt has been paid, obtains from the principal a mortgage or other security for his indemnity, it will inure to the benefit of his cosurety: Brandt on Suretyship and Guaranty, sec. 268; Sheldon on Subrogation, sec. 143; Steele v. Mealing, 24 Ala. 285; Brown v. Ray, 18 N. H. 102; 45 Am. Dec. 361. Under this rule the Proebstel mortgage inured to the benefit of Palmer, and, this being so, it necessarily follows that his equities are prior in time and superior in right to those of Predmore, who became a cosurety of the Proebstels for Snodgrass long after the mortgage was executed. As to Palmer, the mortgage took effect from its execution and delivery, but not as to Predmore until the note upon which he was a cosurety was made, some eighteen months thereafter: Van Winkle v. Johnson, 11 Or. 469; 50 Am. Rep. 495; and hence the latter's rights thereunder are subject to those of Palmer.

The decree will therefore be modified accordingly.

SURETYSHIP.—Security taken by one of several sureties bound by the same instrument for his indemnity against loss inures to the benefit of all though it is received before any of them are liable and without any agreement that the others shall participate in its benefits: Hoover v. Mowrer, 84 Iowa, 43; 35 Am. St. Rep. 293, and note. See, also, the extended notes to Gross v. Davis, 10 Am. St. Rep. 642, and Hall v. Cushman, 43 Am. Dec. 563.

EGAN v. OAKLAND INSURANCE COMPANY.

[29 OREGON, 403.]

INSURANCE, LIMITATION OF TIME WITHIN WHICH TO BRING SUIT, CONSTRUCTION OF.—If a policy of insurance against loss by fire declares that it shall not become payable until sixty days after satisfactory proofs of loss have been received by the insurer, including the award of appraisers, where an award is required, and that no action shall be brought for the recovery of any claim unless commenced within six months next after the fire shall have occurred, the period of six months must be computed from the date of the fire and not from the date when the loss was ascertained and became due and payable. An action commenced seven months after the fire is, therefore, too late.

Cary & McDougal and Spencer & Jones, for the appellant.

Starr, Thomas & Chamberlain, for the respondent.

404 BEAN, C. J. The alleged liability of the defendant rests upon a fire insurance policy issued by it covering the property of the plaintiff's assignor, and the only question presented by the appeal is, the proper construction of the following provisions thereof: "The loss shall not become due and payable until sixty days after satisfactory proof of the loss herein required has been received by this company, including an award by appraisers when appraisal has been required. . . . No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire shall have occurred." The fire occurred on August 17, 1893, and this action was not commenced until March 15, 1894, only two days short of seven months thereafter. There is no claim made that the delay was caused by the action or nonaction of the defendant company, or that it occurred by reason of any dispute or proceedings by arbitration concerning the amount of the loss, or that a reasonable time did not remain after the loss became due and payable in which to bring the action; but the simple question here presented is, whether the time, as limited by the policy, commenced to run at the date of the fire, or at the time the loss was ascertained and became due and payable. It is admitted that the clause of **405** the policy limiting the time in which an action may be commenced thereon is valid and binding, but the contention for plaintiff is, that when construed in connection with the other provisions in the policy, and especially the one providing that the loss shall not become due and payable until sixty days after proof thereof has been furnished to the company, it shows an intention to give him six months after the right to sue accrued in which to bring the action.

At the outset it is important to observe that, under the wording of the clause in question, the six months begin to run from "the time the fire shall have occurred," and not from the time "the loss or damage shall have occurred," or "after the loss," or "after the loss or damage," as in most of the cases cited and relied upon by plaintiff. The latter phrases have been construed by some of the courts to mean that the limitation shall be computed from the time the amount of the loss is ascertained and payable, and the assured's right to bring an action accrues, and not from the time of the happening of the loss: *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; 42 Am. Rep. 297; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235-242; 33 Am. Rep. 607; *Sun Ins. Co. v.*

Jones, 54 Ark. 376; Barber v. Fire etc. Ins. Co., 16 W. Va. 658; 37 Am. Rep. 800; Murdock v. Franklin Ins. Co., 33 W. Va. 407; Chandler v. St. Paul Fire Ins. Co., 21 Minn. 85; 18 Am. Rep. 385; Spare v. Home Mut. Ins. Co., 17 Fed. Rep. 568; Vette v. Clinton Fire Ins. Co., 30 Fed. Rep. 668; ⁴⁰⁶ German Ins. Co. v. Fairbank, 32 Neb. 750; 29 Am. St. Rep. 459; Ellis v. Council Bluffs Ins. Co., 64 Iowa, 507; Miller v. Hartford Fire Ins. Co., 70 Iowa, 707. But other courts of equal weight and respectability have construed such phrases to mean that the assured's right of action must be computed from the date of the happening of the loss, and not from the time the insurer is required to pay: Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151; Fullam v. New York Union Ins. Co., 7 Gray, 61; 66 Am. Dec. 462; Johnson v. Humboldt Ins. Co., 91 Ill. 92; 33 Am. Rep. 47; Chambers v. Atlas Ins. Co., 51 Conn. 17; 50 Am. Rep. 1; Glass v. Walker, 66 Mo. 32; Bradley v. Phoenix Ins. Co., 28 Mo. App. 7; Virginia Fire etc. Ins. Co. v. Wells, 83 Va. 736; Blanks v. Hibernia Ins. Co., 36 La. Ann. 599; Lentz v. Teutonia Fire Ins. Co., 96 Mich. 445; Garido v. American etc. Ins. Co., (Cal. Nov. 20, 1885), 8 Pac. Rep. 512.

Other cases bearing more or less directly on the question could be cited on either side of the proposition, but reference is made to a sufficient number to show that it can hardly be said that the weight of authority is with either contention. The courts which hold that the limitation commences to run at the time the loss is ascertained and payable, and not from the date of the happening of the loss, do not agree as to the reasons for so deciding, but they seem generally to base their decisions upon the ⁴⁰⁷ ground that the limitation clause, when taken in connection with the stipulation in the policy giving the insurer a certain time after proofs of loss in which to pay, is inconsistent, ambiguous, and uncertain, and therefore should be construed more strongly in favor of the insured. But in the case before us there is, in our opinion no room for construction. The stipulation in plain and unambiguous, and susceptible of but one meaning, and, unless we are to disregard entirely the plain and obvious meaning of the language used, we must hold that the phrase, "next after the fire shall have occurred," means from the date of the fire, and not sixty days or some other time thereafter. It is undoubtedly true that an insurance policy, like other contracts, should be so construed as to effectuate the intention of the parties, and, if any of its terms or conditions are ambiguous, they should be construed most strongly against the insurer; but the courts have no right

by construction to disregard the plain provision of a contract as made by the parties, or to hold that it means one thing when it says another. Some of the courts which construe the phrase "after the loss" to mean after the loss is ascertained and the right to sue exists, proceed on the assumption that there is no material difference between such a phrase and "after the fire," and have construed it in the same way: *Steel v. Phenix Ins. Co.*, 51 Fed. Rep. 715; 2 Co. Ct. App. 463; *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352; *Case v. Sun Ins. Co.*, 83 Cal. 473; *Hong Sling, v. Royal Ins. Co.*, ⁴⁰⁸ 8 Utah, 135. And the following cases, although construing life insurance policies, may be said to hold to the same effect: *McConnell v. Iowa Mut. Aid. Assn.*, 79 Iowa, 757; *Matt v. Iowa Mut. Aid Assn.*, 81 Iowa, 135; 25 Am. St. Rep. 483; *Allibone v. Fidelity etc. Co.*, (Tex. Civ. App., Oct. 26, 1895), 32 S. W. Rep. 569.

But we cannot assent to the doctrine of these cases. It seems to us that if "after the loss" means sixty or any other number of days after the happening of the loss, there is a material difference in the two phrases. As so construed, the one fixes as the period at which the limitation shall commence the time the loss is ascertained and payable, and the other in distinct and unequivocal language, the time of the fire, which is certainly a different event. In one of the leading cases holding the doctrine contended for by the plaintiff (*Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297), Danforth, J., says: "No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286, one of the cases cited by the appellant." And in the subsequent case of *King v. Watertown Fire Ins. Co.*, 47 Hun, 1, the supreme court of New York held that under a clause in an insurance policy providing that no action or suit shall be maintained unless "commenced within twelve ⁴⁰⁹ months next after the fire shall have occurred," the limitation commenced to run from the date on which the fire occurred, and not from the expiration of the sixty days given the company in which to make payment after the proofs of loss, and distinguished the case before it from *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297. And Mr. Richards in his work on Insurance, page 193, in considering the effect of a clause in the New York standard policy requiring suit or action to be commenced "within twelve months next af-

ter the fire," says: "The limit of one year for bringing suit is valid, and must be observed, and, under the wording of this clause, the twelve months begin to run from the time of the fire, and not from the time of service of proofs of loss, which, under the former wording of the policy, was held to be the effect of it." This construction is, in our opinion, in accordance with common sense, the plain meaning of the language used, and is abundantly supported by authority: *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877; *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870; *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170; *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286; *King v. Watertown Fire Ins. Co.*, 47 Hun, 1; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *McFarland v. Railway etc. Assn.* ⁴¹⁰ (Wyo. Nov. 14, 1894), 38 Pac. Rep. 347; *Steel v. Phenix Ins. Co.*, 47 Fed. Rep. 863.

The case principally relied upon by plaintiff as supporting his position is *Steel v. Phenix Ins. Co.*, 51 Fed. Rep. 715, 2 Co. Ct. App. 463, decided by the circuit court of appeals of the ninth circuit, McKenna and Gilbert, circuit justices, and Hawley, district judge, sitting. The action was originally commenced in the circuit court of the United States for the district of Oregon on a policy of insurance limiting the time for bringing the action to twelve months "next after the date of the fire from which such loss shall occur": *Steel v. Phenix Ins. Co.* (47 Fed. Rep. 863), and on appeal the decree of Judge Deady was reversed, McKenna, circuit justice, dissenting, the court holding that there was no material difference between "twelve months next after the fire" and "twelve months after the loss," and that the limitation did not commence to run until after the loss was ascertained and became payable. On appeal to the supreme court of the United States, this decision was affirmed by an equally divided court, no opinions being delivered: *Steele v. Phenix Ins. Co.*, 154 U. S. 518. It can hardly be said, therefore, that the question is a settled one in the federal courts. But we are disposed to give to the circuit court of appeals all due respect, and would be inclined to yield to its judgment if, in our opinion, the question was less free from doubt. The argument in support of the view adopted by the majority is, briefly, that because, by the terms of the policy, the company could not be sued until certain conditions were complied with, ⁴¹¹ which would necessarily consume a part of the time limited, and, furthermore, the loss not being payable until sixty days after the proofs thereof, it might happen, if the lim-

itation clause should be construed according to its language, that the action would be barred before the right to sue actually accrued under other clauses in the policy, and therefore the parties cannot have meant what they expressly said. We cannot yield our assent to this line of reasoning. As said by the supreme court of Wisconsin in the case of *Hart v. Citizens' Ins. Co.*, 86 Wis. 77, 39 Am. St. Rep. 877: "It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words, which can have but one meaning, are not subject to construction. 'Twelve months next after the fire' has one certain meaning, and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, but the invocation of this principle does no violence to the contract of the parties." If, acting in good faith and with reasonable diligence, the conditions precedent to a right of action cannot be completed by the insured so as to leave a reasonable time thereafter in which to sue, and this fact is made to appear by the pleadings and proof, the courts should declare the limitation inoperative or void, and not disregard the plain wording of the contract, or incorporate into it a provision which the parties ⁴¹² themselves did not see fit to insert. In our opinion, therefore, the court below committed no error in holding that the limitation commenced to run from the time the fire occurred, and not when the loss became due and payable, and the judgment is affirmed.

THE DECISION in *Provident Fund Soc. v. Howell*, 110 Ala. 508, was in conformity with the rule declared in the principal case. The Alabama case was an action on a policy of accident insurance. It required the plaintiff, within four months from the date of the injury, to furnish to the society affirmative proofs of the injury and of the duration of his disability and that the same resulted proximately from the bodily injury covered by the contract, and it stipulated that legal proceedings for a recovery under the policy should not be brought within three months after the receipt of such proofs at the office of the society, nor at all, unless begun within six months from the date when the society shall have received such proofs. The injury occurred on August 5, 1892, and the only proof made was that received by the society on the 15th of September, 1892. The action was brought April 17, 1893. The trial court held that the period of limitation did not begin to run until three months after the receipt of the proofs, and therefore that the action was brought in time though commenced seven months after the date of the injury. The judgment of the trial court was reversed upon appeal, the court saying that the stipulation was valid, and was too plain for construction.

INSURANCE—LIMITATION OF TIME TO COMMENCE ACTION.—Under a policy providing that no action shall be maintained unless brought within six months after the loss, which shall not become payable until sixty days after proof thereof is received by

the company, the limitation commences to run only from the time the loss is due and payable, and suit may be brought within six months from the expiration of the sixty days: *Firemen's Fund Ins. Co.*, 38 Neb. 150; 41 Am. St. Rep. 727, and note. The contrary doctrine, that is that the time of limitation commences to run from the date of the fire, is maintained in *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877, and *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870, and see, also, the extended note to the latter case where the subject is treated at length.

EX PARTE MON LUCK.

[29 OREGON, 221.]

CONSTITUTIONAL LAW—OPIUM AND LIKE DRUGS, FORBIDDING POSSESSION OF.—A statute forbidding any person from having in his possession or offering for sale any opium, morphine, chloral, or cocaine without first obtaining a license from the county clerk of the county in which he or she resides or does business, and providing that such license shall be issued only to regularly qualified physicians who keep a stock of drugs and medicines for their own use in prescriptions, and regularly qualified druggists, and also forbidding the sale of any such drugs except on the prescription of a physician, and declaring that such drugs shall not be prescribed by physicians except for the cure of disease, is constitutional. By such statute the mere possession of one of the prohibited drugs is made criminal, though it is not kept for gift or sale.

CONSTITUTIONAL LAW—TITLE OF ACT.—In an act entitled an act to regulate the sale and gift of opium and other drugs named therein, the legislature may incorporate a provision making the having in the possession of such drugs criminal.

CONSTITUTIONAL LAW.—THE LEGISLATURE MAY MAKE IT CRIMINAL for a person to have in his possession any opium, morphine, cocaine, and drugs of a like nature, unless procured on the prescription of a regularly licensed physician prescribing for the cure of disease.

Ralph W. Wilbur, for the appellant.

W. T. Hume and C. M. Idleman, attorney general, for the respondent.

423 BEAN, C. J. This is a habeas corpus proceeding, and comes here on appeal from a judgment of the court below remanding the petitioner to the custody of the sheriff of Multnomah county. The petitioner was arrested, tried, and convicted for having in his possession opium, in violation of the provisions of an act entitled "An act to regulate the sale and gift of opium, morphine, eng-she, or cooked opium, hydrate of chloral, or cocaine," approved February 21, 1887: *Laws 1887*, p. 87. The first section of this act provides that "No person shall have in his or her possession or offer for sale" any of the drugs enumerated in the title "who has not previously obtained a license from the county clerk of the county in which he or she resides or does business." Sections from 2 to 6, inclusive, provide the form of

the license; that it shall be issued only to regularly qualified physicians who keep a stock of drugs and medicines for their own use in prescription, and regularly qualified ⁴²⁴ druggists; prohibits the sale and gift of any of the enumerated drugs to any person except on the prescription of a physician or regularly qualified pharmacist, and then only of the kind and quantity therein named; provides that none but physicians and pharmacists who have duly registered as required by the act shall be authorized to prescribe the use of any of such drugs, and then only for the cure of disease, and in such cases and quantities as are recognized by medical science as proper and fit. Section 7 requires physicians and pharmacists who have prescribed any of said drugs to keep a record thereof, which shall be open to public inspection, showing the date of prescription, the name and residence of the patient, the disease for which it was prescribed, and how much and how often the patient was instructed to use the same. Section 8 defines who shall be deemed physicians and pharmacists within the meaning of the act. Section 9 provides the penalty for its violation, and section 10 gives the justices' court jurisdiction of offenses described therein.

1. The petitioner claims that he is illegally restrained of his liberty, because: 1. The act of 1887 does not intend to make the possession of opium a crime unless it is kept for sale or gift; and 2. If it does, it infringes upon the fundamental rights of liberty and property, and is therefore void. That the act with which defendant was charged, namely, having in his possession opium without either license therefor ⁴²⁶ or it having been obtained upon the prescription of a physician or pharmacist for medicinal purposes, is within the restraint of the statute there can be no doubt. The act provides in plain and unambiguous language that no person shall have in his or her possession opium who has not previously obtained a license therefor, unless, as the law clearly implies, it be obtained on the prescription of some duly qualified physician or pharmacist for medicinal purposes. Its evident purpose and object is to regulate the sale and traffic in opium, and the other enumerated poisonous drugs, so as to prevent a prevalent evil by confining their use to strictly medicinal purposes, and to that end it prohibits any person except licensed physicians and druggists from having such drugs in his or her possession unless obtained for medicinal purposes in the manner provided in the act, and such provision is clearly germane to and within the subject of the act as expressed in the title: *Black on Intoxicating Liquors*, sec. 64; *State v. Shaw*, 22 Or. 287.

2. Nor do we think the act, as so interpreted, unconstitutional, as being an infringement on the rights of liberty and property as guaranteed by the fundamental law. Opium is an active poison, and has no legitimate use except for medicinal purposes; but it is frequently used to produce a kind of intoxication by smoking or eating, a loathsome, disgusting, and degrading practice, which results not only in pauperism and crime, but also in the serious impairment of the mental and physical condition ⁴²⁶ of those who indulge in it. The sale and disposition of such a drug may unquestionably be regulated and controlled by law, and whether its nature and character is such that for the protection of the public its possession by unauthorized persons should be prohibited is a question of fact and of public policy, which belongs to the legislative department to determine. The discretion of the legislature in the employment of means which are reasonably calculated to protect the health, morals, or safety of the public is very great; and, so long as it does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitations upon the means of living or some material right essential to the enjoyment of life, its determination is conclusive upon the courts. And, while the state cannot assume to be the guardian of morals, it has the undoubted power to enact measures calculated for the suppression of such forms of vice as threaten its welfare by generating disease, pauperism, and crime, and primarily, it is for the legislature to determine what laws and regulations are needful for that purpose: *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678. Of course, this power must be so exercised as not to arbitrarily infringe upon personal and property rights, but "in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage": *Yick Wo v. Hopkins*, 118 U. S. 370. ⁴²⁷ To this last class, in our opinion, belongs the case before us. The act does not forbid the possession or prohibit the sale of opium, but allows both under such regulations and conditions as will, it is believed, tend to prevent its harmful and improper use. No right secured by the fundamental law is interfered with or impaired by this legislation, because the possession and use of the drug are not restrained thereby so as to destroy its value as a remedial agent, its only recognized legitimate use. Its object and purpose is to so regulate the possession, sale, and disposition of a dangerous yet useful drug as to prevent the weak and unwary

from using it to their own physical and mental ruin, and to the serious injury of the general public, and, in our opinion, violates no constitutional right: *State v. Ah Chew*, 16 Nev. 50; 40 Am. Rep. 488; *Ex parte Yung Jon*, 28 Fed. Rep. 308; *Ah Lim v. Territory*, 1 Wash. 156; *Davis v. State*, 68 Ala. 58; 44 Am. Rep. 128; *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344.

We are not unmindful of the fact that some courts have held that the legislature cannot make it a crime to have in one's possession intoxicating liquors, although it may regulate or even prohibit the sale and disposition thereof: *State v. Gilman*, 33 W. Va. 146; *Tiedeman on Police Power*, sec. 68. But the principle of these cases has no application here. It is a matter of common knowledge that intoxicating liquors are produced principally for sale and consumption as a beverage, and so common has been their manufacture ⁴²⁸ and use for this purpose that they are regarded by some courts as legitimate articles of property, the possession of which neither produces nor threatens any harm to the public. But the use of opium for any purpose other than as permitted in this act has no place in the common experience or habits of the people of this country, but is admitted by all to be an insidious and demoralizing vice, injurious alike to the health, morals, and welfare of the public; and, therefore, its possession, unless in the manner provided by the legislature for the purpose stated, cannot be presumed to be of any value to its owner, except on the hypothesis that he intends to make a use of it injurious to himself and the general public, and hence it is within the legitimate exercise of the police power of the state to regulate its sale and confine its possession to certain designated persons, as a means of public safety. It follows that the judgment of the court below is right and must be affirmed.

CONSTITUTIONAL LAW—PROHIBITION OF OPIUM.—A statute prohibiting the sale of opium is constitutional: *State v. Ah Chew*, 16 Nev. 50; 40 Am. Rep. 488.

STATE v. SEARS.

[29 OREGON, 508.]

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS.—A redemption law extending the time for redemption from execution sales of real estate from four to twelve months cannot be applied to foreclosure sales under mortgages executed prior to its passage without impairing the obligation of contracts.

M. W. Smith and W. S. Perry, for the appellant.

Stott, Boise & Stout, for the respondent.

582 **PER CURIAM.** On the 27th of January, 1896, an opinion reported in 43 Pac. Rep. 482, was filed in this case, holding that the act of the legislature, approved February 23, 1895, (Laws 1895, p. 59), extending the time for redemption from execution sales of real estate from four to twelve months, applied to foreclosure sales under mortgages executed prior to its passage and did not impair the obligation of the mortgage contract. Since that time, however, the supreme court of the United States, in *Barnitz v. Beverly*, 163 U. S. 118, on writ of error from the state of Kansas, has held that a state statute which extends the period of redemption beyond the time allowed at the date of the execution of the mortgage cannot constitutionally apply to a sale under a mortgage executed prior to its passage. Within the doctrine of that case, and the principle therein announced, our decision is erroneous, and, as the question is one of federal cognizance, we are, of course, bound to follow the decision of the highest federal court.

583 The judgment heretofore rendered by this court must therefore be annulled and set aside, and the judgment of the court below reversed, and the cause remanded with directions to issue the peremptory writ of mandamus as prayed for.

THE DECISIONS IN THE STATE COURTS respecting the constitutionality of statutes purporting to give to debtors a time within which to redeem from execution or foreclosure sales where no previous right of redemption existed, or in the case of the previous existence of the right, extending the time within which it might be exercised, were very evenly divided. Thus the constitutionality of such statutes was affirmed in *Moore v. Martin*, 38 Cal. 428; *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257; *State v. Gilliam* (Montana Sup. Ct., March 1896), and denied in *Thorne v. San Francisco*, 4 Cal. 154; *Watkins v. Glenn*, 55 Kan. 417; *Wilber v. Campbell* (Idaho, Sup. Ct., January, 1896), but the decisions in denial made in California and Kansas were overruled by subsequent decisions made in the same states. It now appears, however, that the earlier decisions in both states were correct. In the comparatively recent case of

Barnitz v. Beverly, 163 U. S. 118, it appeared that certain promissory notes had been executed and secured by a mortgage on real property situate in the state of Kansas, and that in January, 1893, an action was brought to recover the amount remaining unpaid upon the notes and to compel a sale of the mortgaged property to the extent necessary for their satisfaction. The judgment was recovered July 7, 1893, and an order of sale was issued thereon January 9, 1894, under which a sale of the mortgaged premises was made on the 12th of February, in the same year. When the motion was made, February 16, 1894, to confirm the sale, one Beverly appeared and claimed to have become the owner of the premises by virtue of conveyances made by the mortgagors subsequent to the execution of the mortgage, and asked that the sheriff be directed to execute to the purchaser a certificate of purchase as provided by the laws of Kansas enacted in 1893. The sale was, however, confirmed, and the motion of Beverly overruled. He appealed to the supreme court of the state, which at first affirmed the judgment of the trial court, but afterward, on an application for rehearing, set aside its first decision, reversed the judgment of the trial court and directed that the sheriff's deed be not executed to the purchaser, and that, instead thereof, he be given a certificate of purchase. At the time when the debt was contracted and the mortgage given, real property was not subject to redemption by the statutes of Kansas, but, in the year 1893, a statute was enacted declaring that real estate sold by a sheriff should be subject to redemption at any time within eighteen months from the date of sale, and that the provisions of the statute should apply to all sales under foreclosure of mortgage, trust deed, mechanic's lien, or other lien, whether general or special. It will be observed that the question in issue in this case was not precisely the same as that involved in the principal case. The principal case merely extended a pre-existing right of redemption, while the Kansas case gave a right of redemption where none previously existed. It would seem, however, that the principle applicable to the two cases must be precisely the same, and this the general language employed in the decision of the supreme court of the United States indicates. That court, after considering many previous decisions upon the same subject, which it deemed relevant to the controversy, concluded as follows:

"Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no rights of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. Let us briefly apply the conclusion thus reached to the facts of the present case. The plaintiff was the holder of several promissory notes, dated November 1, 1895, secured by a mortgage of the same date upon a tract of land in Shawnee County, Kansas. The mortgage contained an express waiver of an appraisal of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisal, that the proceeds

arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption. Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter, the mortgagor or the owner had no possession, title, or right in any way to the premises. Under the new law, the mortgagor shall have eighteen months from the date of sale within which to redeem, and, in the mean time, the rents, issues, and profits, except what is necessary to keep up repairs, shall go to the mortgagor or owner of the legal title, who, in the mean time, shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest, and costs, but of the amount paid by the purchaser, with interest, costs, and taxes. In other words, the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the mean time. What is sold under this act is not the estate pledged (described in the mortgage as a good and undefeasable estate of inheritance, free and clear of all encumbrance), but a remainder—an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits. The twenty-third section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution, or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem. Obviously this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation.

"We, of course, have nothing to do with the fairness or the policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months? Martha Barnitz held Kirtland's notes secured by a mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right

to levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they become the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is, whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties. It is contended that the right to redeem granted by the new statute only operates on the purchaser and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson v. Kinzie*, 1 How. 311, where this court said: 'It, the new act, declares that although the mortgaged premises should be sold under the decree, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate to the judgment creditors to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable estate in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditors (meaning creditors other than the mortgagee) an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution': *Barnitz v. Beverly*, 163 U. S. 18.

STATUTES IMPAIRING OBLIGATION OF CONTRACTS.—This subject, with special reference to the constitutionality of redemption laws, is discussed in the note to *Beverly v. Barnitz*, 49 Am. St. Rep. 275, 278.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE

ANDERSON v. MILLER.

[96 TENNESSEE, 35.]

NEGLIGENCE—RIGHT TO RECOVER FOR, AFTER INSURANCE RECEIVED.—An owner of property wrongfully destroyed by fire, may maintain an action in his own name against the wrongdoer, to recover for such destruction, although he has been fully compensated for his loss by an insurer, who, by subrogation, is entitled to any damages that he may recover in such action.

NEGLIGENCE—INJURY TO PROPERTY.—MEASURE OF DAMAGES for negligent injury to, or destruction of, a building, is the amount necessary to restore the property to its former condition, or, in other words, to replace the building by another of equal value, taking the age and depreciation in value of the former into consideration.

NEGLIGENCE—UNAUTHORIZED USE OF PROPERTY.—If a tenant having rented a building for the storage of vehicles uses it for the storage of cotton without authority, he is liable for an injury to the building by fire caused by the more dangerous and combustible nature of the cotton.

NEGLIGENCE—USE OF LEASED BUILDING—PROXIMATE CAUSE.—If a tenant having leased a building for the storage of certain articles, uses it without authority for the storage of other and highly inflammable materials, with the result that the building is destroyed by fire, which would not have reached it but for the fact of such use, the inflammable material is the proximate cause of the injury and the tenant is liable for the loss.

LANDLORD AND TENANT.—THE TENANT'S RIGHTS IN LEASED PREMISES are measured by, and cannot exceed, the rights of the landlord.

Steger, Washington & Jackson and R. L. Morris, for the appellants.

Nolen & Slemons and Henderson & Eggleston, for the appellee.

³⁶ WILKES, J. This is an action for damages growing out of a fire upon premises belonging to plaintiffs, Miller and wife, but occupied by Anderson, and by Grantland as lessee or tenant under Anderson. The cause was tried before the court and jury, and judgment rendered for plaintiffs for seventeen hundred dollars, and defendants have appealed and assigned errors.

It appears that Anderson and Mrs. Miller owned adjoining stores, or business houses, in Nashville, the buildings being only a few inches apart, the roofs coming down together, and being drained by the same gutter. In August, 1891, Anderson, being pressed for room in his building, rented Mrs. Miller's building, or a part of it, from her agent, ³⁷ for the purpose of storing his buggies and carriages on the first floor. It is a matter of some controversy whether he was to have the use of the basement and second story, or only the first, and this question was submitted to the jury under a proper charge. However this may be, he sub-rented to Grantland the basement and second story for the storage of cotton, and it was occupied by him for this purpose from November, 1891, to February 24, 1892, so far as the record discloses, without the plaintiff's knowledge. At that date a fire originated in Anderson's house, or factory, completely destroying it, as well as the roof and part of the second story floor and the rear windows and frames of Mrs. Miller's house. Mrs. Miller's building was fully insured, and she collected from the insurance company two thousand four hundred and twenty dollars in full of her loss. She used one thousand nine hundred and eighty dollars and fifty cents of this amount to repair her building, making it as valuable as before the fire. She then sued Anderson and Grantland, averring that Anderson only rented the first story of her building for storing buggies, etc., and he and Grantland had wrongfully taken possession of the second story, and permitted cotton to be stored therein, by reason of which fact fire was conveyed into the second story from the Anderson building and burned the floor and roof, and made it difficult and well-nigh impossible to extinguish the fire, so that the floor and roof were destroyed.

A separate count admits the rightful possession of ³⁸ the second story, but alleges that cotton, a highly inflammable substance, was stored therein, contrary to express agreement. Several pleas were filed, both general and special. Among the latter, it was set up that plaintiff had been already paid the full value of her house by the insurance company, and that the insurance company was subrogated to all of plaintiff's rights of action.

These pleas were, on motion, stricken out as insufficient, and this is assigned as error. It is also assigned as error that the trial judge committed an error in his charge to the jury, which will be assigned as error. It is also assigned as error that the trial court charged that the measure of damages was the reasonable cost of restoring the property to its former condition. Other errors are assigned, which are not material, and need not be specially considered except that the court charged the jury that the rights of Grantland were measured by those of Anderson, because it was through him he occupied the premises.

In regard to the proper parties to the action, we do not think the assignment well taken. If it be conceded that the insurance company, having paid the entire fire loss, is now entitled to be subrogated to the rights of the insured as against the tortfeasor, or to recover back from him the amount he recovers, still it does not prevent a recovery in the name of the insured for the damage sustained. The question of who will be entitled to the proceeds of the recovery, the insurer or the insured, is a matter³⁹ between them, and constitutes no defense to an action for the damages caused by the wrong which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer: 24 Am. & Eng. Ency. of Law, 308-310; Perrott v. Shearer, 17 Mich. 48, 55, 56; Clark v. Wilson, 103 Mass. 219, 227; 4 Am. Rep. 532; Hayward v. Cain, 105 Mass. 213; Weber v. Morris etc. R. R. Co., 35 N. J. L. 409, 10 Am. Rep. 253; Mason v. Sainsberry, 3 Doug. 61; Yates v. Whyte, 4 Bing. N. R. 272; Hart v. Western R. R. Co., 13 Met. 99, 46 Am. Dec. 719; Concord etc. Ins. Co. v. Woodbury, 45 Me. 453; Carpenter v. Provident etc. Ins. Co., 16 Pet. 501; Insurance Co. v. Updegraff, 21 Pa. St. 518; Kernochan v. New York etc. Ins. Co., 17 N. Y. 428; Honore v. Lamar etc. Ins. Co., 51 Ill. 410; Norwich etc. Ins. Co. v. Boomer, 52 Ill. 442; 4 Am. Rep. 618.

In Perrott v. Shearer, 17 Mich. 48, the defendant, a sheriff, wrongfully levied on goods, the property of the plaintiff, assignee. The assignee had insured said goods, and they were destroyed while in possession of defendant, sheriff. In an action to recover the value of the goods, the defendant pleaded that the plaintiff had been paid value of same by insurance company. Cooley, judge, delivered the opinion of the court, and said: "He, the defendant, is found to be a wrongdoer in seizing the goods, and he cannot relieve himself from responsibility to account for their full value, except by restoring them. He has no concern

with any contract the plaintiff may have with any other party in regard to the ⁴⁰ goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he run when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured he cannot be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter pays an equivalent in the premium, and is, therefore, entitled to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is, therefore, justly entitled to no return. The case, we think, is within the principle of *Merrick v. Brainard*, 38 Barb. 574, which appears to us to have been correctly decided. The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods, and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fully compensated. It is not a question of importance in this inquiry whether the act of the defendant caused the loss or not; his equitable claim to a reduction of damages, ⁴¹ if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to this is, that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities": *Perrott v. Shearer*, 17 Mich. 55, 56.

Clark v. Wilson, 103 Mass. 219, 4 Am. Rep. 532, was an action for wrongful conversion of a boat. Plaintiff had received from insurance company full value of vessel, but sued the defendant for conversion. It was pleaded that plaintiff had received from insurance company full value of the vessel, and that therefore the right of action, if any, was in the insurance company. The court said: "The result is, that allowing to the abandonment made by the plaintiffs and the recovery and payment of a total loss the full effect, for which the defendant contends, of an abandonment by an absolute owner and payment of a total loss to him, that did not defeat the right to bring an action at

law in the name of the plaintiffs for the tort previously committed against them. The question whether the damages recovered will belong to them or to the insurers is a question in which the defendant has no interest, and which is not now in issue": *Clark v. Wilson*, 103 Mass. 227; 4 Am. Rep. 532. *Weber v. Morris etc. R. R. Co.*, 35 N. J. L. 409; 10 Am. Rep. 253; was an action of insured against railroad company for the benefit of insurance company, the ⁴² insurance company having paid the amount of loss. The court said: "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and insurer regarded as one person. Therefore, payment by the insurer before suit brought cannot affect the right of action."

In *Mason v. Sainsbury*, 3 Doug. 61, suit was brought on the riot act, to recover damages for the demolition of a house in the riots of 1780. The property having been insured in a fire office, which paid the loss, the action was in the name of the insured, and for the benefit of the insurance office. Lord Mansfield held that payment by the insurer was not in ease of the hundred, and not as co-obligors, and that the case must be considered as if not a farthing had been paid. "He likened it to the case of abandonment in marine insurance, where the insurer is constantly put in the place of the insured."

Chief Justice Abbott, in citing the case of *Mason v. Sainsbury*, 3 Doug. 61, in *Clark v. Blything*, 2 Barn. & C. 254, says he could not entertain any doubt of its propriety, and he held that, where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from the insurance office, he might, nevertheless, maintain his action against the hundred.

In *Yates v. Whyte*, 4 Bing. N. R. 272, which ⁴³ was the case of a collision at sea, the plaintiff recovered his whole loss, notwithstanding his prior recovery of a portion of it from the underwriters, the court saying that the plaintiff would hold in trust for the underwriters such portion as they had paid him.

These cases are referred to, and their authority recognized, by Chief Justice Shaw in *Hart v. Western R. R. Co.*, 13 Met. 99; 46 Am. Dec. 719; and in *Monmouth etc. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107, this rule is said to be settled: *Weber v. Morris etc. R. R. Co.*, 35 N. J. L. 413; 10 Am. Rep. 253.

Hayward v. Cain, 105 Mass. 213, was an action by insured against the defendant for maliciously setting fire to plaintiff's building. The plaintiff received the amount of damages from

the insurance company. The court said: "The transaction between the insurers and the owners of the property injured were matters in which the wrongdoer had no concern, and which do not affect the measure of his liability."

In regard to the measure of damages, the charge of the court was correct in directing the jury that it would be the reasonable cost of restoring the property to its former condition. This does not mean, as argued by counsel, that it was the cost of a new building, the same as that destroyed, and the jury could not have so understood it, but the proper construction was, that the building, as restored, ⁴⁴ should be of equal value to that destroyed, taking age and depreciation into consideration. In other words, to reinstate plaintiff as before the fire. The jury was told, in express terms, that no recovery could be had if Anderson rented the entire building, or had permission to store cotton therein, or that such storage was the ordinary and usual use of the building.

The only other question material to be considered is, whether the act of the defendants in storing the cotton in the house was the proximate cause of the loss, and whether the charge of the court upon this point was misleading or not. It is insisted that the proximate cause was the fire which originated on Anderson's premises, and, no negligence of defendants being shown in connection therewith, defendants would not be liable. On the other hand, it is insisted that this fire would not have communicated to plaintiff's house but for the cotton stored therein, and hence this storage was the proximate cause of plaintiff's loss, and not the fire originating elsewhere. The definitions of proximate cause are easily given in general terms, but they are very difficult in practical application to the facts of each particular case. There is, however, a marked distinction between the proximate cause of an accident and the proximate cause of the injury resulting from the accident. This is illustrated in the case of *Deming v. Cotton-press Co.*, 90 Tenn. 353, in which the court said: "It is true the fire destroyed the cotton, ⁴⁵ and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train happened while it was being removed, so that, but for this fact, the cotton would have been saved. This [the breaking of the train] must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it."

In *Railroad v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902, goods

were consumed by fire which was not the result of defendant's negligence, but the goods would never have become exposed to the fire but for the negligent failure and refusal to deliver the goods on demand previous to the fire, so that, while the fire caused the loss, the failure to deliver caused the injury.

In *Postal Tel. etc. Co. v. Zopfi*, 93 Tenn. 374, the same distinction is illustrated where the fall of a young girl was caused by the slippery condition of a walkway, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen. In that cause a hypothetical case is put to further illustrate the distinction of a person falling upon an ice-covered pavement into an open cellar. In such case, the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred. This case collates many authorities recognizing ⁴⁶ and enforcing the same distinction: *Postal Tel. etc. Co. v. Zopfi*, 93 Tenn. 375.

With this distinction in view, the question of liability of defendants is easily solved. The jury were properly instructed in regard to Anderson's rights under his rental agreement; that if he rented the premises with the understanding that he might store cotton in them, or such storage was a reasonably safe use of the premises, attended with no more danger than the purposes to which he intended to put them, then the defendants would not be liable, but if the storing of cotton was a more dangerous use than the storing of vehicles, for which he rented the premises, or if he occupied the premises without authority for any purpose, then he would be liable for the injury which resulted. The jury evidently found this contention unfavorably to Mr. Anderson, and the record justifies and warrants such finding.

The only question remaining is, Did this unauthorized storage of cotton on the premises proximately cause the injury? The court instructed the jury that "if they found the fire was not communicated to plaintiff's house by the cotton, but that the inflammable nature thereof prevented the firemen from being able to extinguish the fire, and that it could have been extinguished but for the presence of this cotton, with little or no damage to the property, then the plaintiffs are entitled to recover ⁴⁷ such damages as immediately and proximately resulted therefrom."

In connection with this he further said: "If you find that the cotton was the proximate cause of the burning of the plaintiff's house, in being the means without which the fire would

never have been communicated to plaintiff's house, then plaintiff can recover. On the other hand, if you find that the cotton did not, in the first instance, communicate the fire to plaintiff's building, and that it was not the proximate cause of the burning of the house, and if you further find that it did not operate as the efficient cause which prevented the firemen from extinguishing the fire in time to save the building, but simply intensified the flame and smoke of the burning building, or if you find that substantially the same damage would have resulted to plaintiff's property, even though there had been no cotton stored therein, then plaintiff cannot recover for any damage to the building on account of said fire. So, if the fire accidentally originated in the adjacent building, and this accidental fire was the proximate cause of the injury to plaintiff's building, then plaintiff cannot recover therefor. By proximate cause, as used in the foregoing instructions to you, and as elsewhere used in this charge, is meant the efficient controlling event or act that produced the injury, the act or event which, without any intervening cause, brought about the injury complained of."

48 This charge is altogether fair and favorable to the defendants. We think the court might even have said that, if defendants had put their premises to an unauthorized use by storing inflammable material therein, then they would have been liable for a fire, no matter when or how originating, if it communicated to the building by reason of the presence of such material, and would not have communicated with or injured the building but for the presence of the inflammable, unauthorized material stored.

Here the wrong consisted and the injury resulted from the storage (unauthorized) of inflammable material, when it was liable to be reached by a fire, no matter when or how originating in adjoining premises, and which would have been harmless to this building but for the unauthorized presence of this inflammable material. The principle would have been the same if benzine, naphtha, gunpowder, or other easily inflammable or combustible material had been stored, without permission, where it could be reached by fire which would not have communicated with other less inflammable material, or could have been more easily controlled or prevented.

The court charged the jury that the rights of Mr. Grantland were to be measured by those of Anderson, because it was through him that he occupied the premises. This is correct, and the jury no doubt understood that his liability, as well as his

right, was commensurate with that of Anderson, so far as plaintiffs were concerned. Although Mr. ⁴⁹ Grantland may have rented in good faith, believing that Anderson had the right to sublet to him, still the fact remains that he, as well as Anderson, was a trespasser and wrongdoer, and Anderson could no more authorize Grantland to put the premises to an unwarranted use than he could put them to such use himself, and both stand upon the same ground of liability to the plaintiff: *Smith v. Street R. R.*, 87 Tenn. 636; *Railroad v. Bingham*, 87 Tenn. 523.

We find no reversible error in the record, and the judgment of the court below is affirmed, with costs.

NEGLIGENCE—RECOVERY FOR, AFTER COMPENSATION RECEIVED.—Where the plaintiff's buildings were burned by the negligence of the defendant, it was held that the plaintiff was entitled to recover their entire value, notwithstanding the fact that the insurer of the buildings had paid him the amount of the insurance: *Weber v. Morris etc. R. R. Co.*, 35 N. J. 409; 10 Am. Rep. 253.

REAL PROPERTY—SETTING OUT FIRE—LIABILITY.—One who sets a fire on his own premises immediately surrounded by highly combustible and inflammable material up to the very border of the adjoining owners' land, is guilty of negligence under any circumstances and is liable for the injury to his neighbor's property if the fire is communicated thereto: *Brummit v. Furness*, 1 Ind. App. 401; 50 Am. St. Rep. 215, and note. See, also, the extended note to *McNally v. Colwell*, 30 Am. St. Rep. 501.

LOUISVILLE & NASHVILLE RAILROAD Co. v. ODIL.

[96 TENNESSEE, 61.]

CARRIERS—DEVIATION FROM ORIGINAL ROUTE.—If goods can be properly cared for and held until the shipper can be communicated with, the carrier is not justified in deviating from the original route and selecting another, because of a strike, without notice to, and instructions from, the shipper.

CARRIERS—DEVIATION FROM ORIGINAL ROUTE.—A carrier who, without justification, deviates from the original route and selects another, for the transportation of goods, is liable for losses resulting, even from inevitable casualties, and becomes, in effect, an insurer for the line he selects. The shipper's right to recover of him is not waived by an effort made at his instance to recover from the carrier selected by him.

CARRIERS—SALE OF GOODS EN ROUTE.—A carrier is liable for the loss arising from a sale of perishable goods en route and obstructed by a strike, if they are sold without notice to the shipper, and instructions from him, if notice could have been given and instructions obtained, without inconvenience to the carrier, or delay endangering the safety of the goods.

B. Smith, for the appellant.

M. T. Bryan, for the appellee.

⁶² WILKES, J. This action was brought before a justice of the peace to recover damages for the loss of one hundred and sixty barrels of potatoes. The cause, on appeal, was tried in the circuit court, before the circuit judge, without a jury, and, on request, he reduced his finding to writing, and gave judgment for plaintiff for two hundred and eighteen dollars and twenty-nine cents and costs, and the railroad appealed and assigned errors.

The bill of lading, as well as the proof, shows that the potatoes, at the plaintiff's direction, were routed to go by the Louisville & Nashville Railroad Company to Evansville, Indiana, and from thence by the Evansville & Terre Haute Railroad, and into Chicago over the Chicago & Eastern Illinois Railroad. The potatoes were loaded on the cars at Nashville at about 5 o'clock in the evening on June 28, 1894. They left the depot at Nashville at 10:20 P. M., and reached Evansville at 10 A. M. the next day. The potatoes were tendered to the Evansville & Terre Haute Railroad immediately upon their arrival, but that road declined to take them, on account of a strike then prevailing on the Chicago & East Illinois Railroad, its Chicago connection. Thereupon the Louisville & Nashville Railroad Company delivered the potatoes to the Peoria, Decatur & Evansville Railroad, which had a line into Chicago, connecting with the Wabash Railroad at Sullivan, and running into the city over that ⁶³ road. This road, at that time, was open to Chicago, and was as well equipped and expeditious as the road over which plaintiff had routed the potatoes, and was in no sense inferior. After the potatoes had been delivered to that road, and had started upon their transit, the strike spread to the Wabash road, and that road refused to receive the potatoes on their arrival at Sullivan, the junction point. The potatoes were thereupon taken back to Peoria, and placed in the hands of a warehouseman and sold for the railroad, upon the idea and belief that, being perishable, this disposition was the best for the shipper and other persons concerned. No notice was given the plaintiff that the Evansville & Terre Haute Railroad had refused to receive the potatoes at Evansville, or that they had been sent over the Peoria road, or that they had been diverted to and sold at Peoria, until some days after the shipment. When informed of the sale, plaintiff refused to accept the proceeds. Plaintiff had another car of potatoes ready to ship the next morning, and had delivered them to be carried by the same route to the same destination, but about noon of that day the agent of the defendant road notified the plaintiff

that no more freight would be received to pass over the Terre Haute route, except the shipments were made subject to delay. Although this notice was given in regard to the second car of potatoes then ready for shipment at Nashville and loaded on the cars, no statement was made or information ⁶⁴ given as to the deviation in the route of the car shipped the previous evening. The plaintiff states that he made no inquiry as to that shipment, supposing that it had left Nashville by the first train, at 6 P. M., and was well on its way to its destination.

It is insisted in the assignment of errors that, under the facts in this case, an emergency had arisen which justified a deviation in route, inasmuch as the one chosen by the shipper was closed by a strike, and the other, equally good, was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands it, a deviation from the route agreed upon with the shipper may be made, and will be justifiable, as, for instance, forwarding perishable freight by rail when a storm prevents a boat from proceeding upon its voyage. But, where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to him and instructions from him: Ray on Freight Carriers, sec. 81; Hutchison on Carriers, sec. 14. See, also, Louisville etc. R. R. Co. v. Campbell, 7 Heisk. 261. Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties, and the original carrier becomes, in effect, an insurer for the line he selects: Ray on Freight Carriers, sec. 79; Hutchison on Carriers, sec. 314.

It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire, ⁶⁵ and their instructions taken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the mean time; and, failing to do this, the defendant road must be held to be liable for any injury resulting upon the substituted route. It also clearly appears that the freight was not of such perishable nature as to necessitate the immediate transshipment, without notice to plaintiff, to another route, in order to prevent their loss. The potatoes, it is shown, would have kept for several weeks without material injury or loss, though, upon this point, there is considerable conflict of testimony. It is, however, shown as a fact, that the potatoes loaded at Nashville and not shipped remained on the cars for several weeks, and until the strike terminated, with-

out injury. The failure subsequently to notify plaintiff that his potatoes had been sent to Peoria, and ordered sold was also a dereliction of duty which would render the carrier liable for damages.

It is insisted that plaintiff should not recover because he made an effort to secure payment for his loss from the Peoria road, on which the transshipment was made. It sufficiently appears that this was done at the instance of the agent of the Louisville & Nashville Railroad, and with the assurance that it should not prejudice plaintiff's claims against that road.

We think, upon the facts of this case, that there is no error in the judgment of the court below, and it is affirmed, with costs.

CARRIERS—DEVIATION.—One who undertakes to carry goods safely between two given places is bound to pursue the usual and customary route, and is liable for all loss sustained in consequence of an unnecessary deviation from it: *Powers v. Davenport*, 7 Blackf. 497; 43 Am. Dec. 100, and note. A common carrier is bound to proceed without deviation from the usual and ordinary course to the place of delivery, under a bill of lading intended as a contract to deliver goods at a certain place: *Bennett v. Bryam*, 38 Miss. 17; 75 Am. Dec. 90, and note.

HINES v. WILLCOX.

[96 TENNESSEE, 148.]

EVIDENCE—INDEPENDENT PAROL AGREEMENT.—In an action by a tenant against his landlord to recover for personal injury received by reason of the dangerous condition of the leased premises, parol evidence that the landlord agreed to put such premises in safe condition before the lease was executed, or that at the time it was executed, the landlord or his agent represented that the premises had been put in safe condition as promised, is admissible if the lease contains only the obligations and undertakings imposed upon the tenant, and nothing in conflict with such independent collateral agreement.

EVIDENCE—INDEPENDENT COLLATERAL AGREEMENT.—The question whether an entire contract was reduced to writing, or an independent collateral agreement was made, is one of fact for the jury, if there is any evidence to sustain such parol agreement.

LANDLORD AND TENANT—LIABILITY FOR DANGEROUS PREMISES.—A landlord who leases premises which are at the time in an unsafe and dangerous condition, is liable to his tenant for damages that may result therefrom, if he knows the fact and conceals it, or if by reasonable care and diligence he could have known of such dangerous and unsafe condition; provided, that the tenant exercises reasonable care and diligence to ascertain the condition of the premises.

H. Parks, E. A. Price, and J. W. Gaines, for the appellant.

R. T. Smith and R. McP. Smith, for the appellee.

149 WILKES, J. 'This is an action for damages for personal injuries sustained by the plaintiff while occupying **150** the house of defendant as his tenant. The cause was heard before the court and a jury, and there was a verdict for the defendant and judgment against plaintiff for costs, and she has appealed and assigned errors. The plaintiff, with several members of her family and boarders in the house, was injured by the falling of a defective and unsafe back porch.

There are two counts in the declaration, the first alleging, in substance, that defendant contracted that the house should be put in safe and tenantable condition before the rental contract was made, and that, at the time the contract was closed, the defendant's agent represented and stated that it had been put in a safe and tenantable condition, as had been previously promised and agreed. The second count alleges, in substance, that the house was in an unsafe and dangerous condition when plaintiff rented it from defendant and that defendant and his agent knew of this fact and concealed it from her, and that it was not known to her.

The pleas were, in effect, a general denial of the truth of the matters alleged, not guilty, and contributory negligence. There was what is termed a rental contract, signed by the parties, in the words and figures following:

"Nashville, September 28, 1892.

"A. V. S. Lindsley, agent, has this day rented to M. P. Hines and wife, Lucy S. Hines, the two-story dwelling-house on the southwest corner of **151** Church and McLemore streets for one year from October 1, 1892, to October 1, 1893, for \$50 per month, payable monthly, in advance. To secure payment of said sum, said M. P. Hines and wife have this day executed twelve notes, payable to A. V. S. Lindsley, agent, falling due, one October 1, 1892, and one on the first of each month thereafter till the twelve notes are paid. M. P. Hines and wife further agree and bind themselves to keep said premises clean and in a sanitary condition satisfactory to the city authorities. Should any of the above notes remain due and unpaid, A. V. S. Lindsley, agent, reserves the right to re-enter and take possession, or to enter suit for collection of all notes unpaid. A. V. S. Lindsley, agent, also reserves the right to re-enter and take possession of

said premises should M. P. Hines and wife fail to keep said property in a good sanitary condition.

(Signed) "A. V. S. LINDSLEY, Agent.

"By J. T. Lindsley,

"M. P. HINES,

"L. S. HINES."

During the rental year M. P. Hines, the husband, died, and L. S. Hines, his widow, continued to occupy the premises under the same contract previously made with her and her husband, and the injuries occurred after his death.

The case has been most ably and elaborately argued on both sides, and a vast array of authorities have been collected and commented upon. We can ¹⁵² only notice the salient features which must determine the decision of the case, leaving many others untouched.

The trial judge excluded from the jury all evidence offered by plaintiff to show that defendant made any promise or agreement to put the premises in good and safe condition before the rent contract was signed, and all evidence as to statements made that the premises had been put in safe and tenantable condition at the time and contemporaneous with the signing. This is assigned as error. In excluding the evidence, the court said it was done because: "1. It goes to alter the terms of a written lease to plaintiff. 2. It attempts to introduce a warranty of the condition of the premises at the time of the demise, when no such warranty is contained in the lease. 3. Because the complaint made by plaintiff of the condition of the premises had no reference to the condition of the porch or its insecurity at or before the time the lease was executed, said complaint relating only to minor matters, such as the accumulation of dirt on the premises, the absence of glass from the windows, and the absence of grates from some of the fireplaces in the house. Witness has testified to nothing else. 4. The promise alleged to have been made by defendant's agent to put the place in repair, or the representations that the place had been put in repair, ¹⁵³ must be held to have reference only to the previous complaints made by the defendant."

The plaintiff excepted to the action of the court. Taking up these grounds of exception to the trial judge's action, we will examine them in the light of the facts of this case.

The general rule is, that parol evidence is not admissible to contradict a written agreement, whether simple or by deed: Bedford

v. Flowers, 11 Humph. 242; Ellis v. Hamilton, 4 Sneed, 512; Bryan v. Hunt, 4 Sneed, 544; 70 Am. Dec. 262; Price v. Allen, 9 Humph. 702; McLean v. State, 8 Heisk. 22; Fields v. Stunston, 1 Cold. 40; Stewart v. Phoenix Ins. Co., 9 Lea, 104; Weisinger v. Bank, 10 Lea, 330; Nashville Life Ins. Co. v. Mathews, 8 Lea, 508; East Tennessee etc. R. R. Co. v. Gammon, 5 Sneed, 571; Kearley v. Duncan, 1 Head, 400; 73 Am. Dec. 179.

But this rule does not apply in cases where the parol evidence in no way contradicts or alters the terms of the written contract, but tends to establish an independent or collateral agreement not in conflict with it: Betts v. Demumbrune, Cooke, 48; Lienau v. Smart, 11 Humph. 308; Cobb v. Wallace, 5 Cold. 539; 98 Am. Dec. 435; Lytle v. Bass, 7 Cold. 303; Stewart v. Phoenix Ins. Co., 9 Lea, 104; Vanleer v. Fain, 6 Humph. 104; Ferguson v. Rafferty, 6 L. R. Ann. 32; notes; Durkin v. Cobleigh, 156 Mass. 108; 32 Am. St. Rep. 436; 17 L. R. Ann. 270, and notes.

Nor does it apply in cases where the original contract was verbal and entire, and a part only of ¹⁵⁴ it was reduced to writing: 1 Greenleaf on Evidence, 15th ed., sec. 284 a; 1 Starkie on Evidence, 267; Vanleer v. Fain, 6 Humph. 104; Dick v. Martin, 7 Humph. 263; Mitchell v. Planters' Bank, 8 Humph. 216; Leinau v. Smart, 11 Humph. 308; Cobb v. O'Neal, 2 Sneed, 438; Cobb v. Wallace, 5 Cold. 539; 98 Am. Dec. 435; Bryan v. Hunt, 4 Sneed, 543; 70 Am. Dec. 262; Lytle v. Bass, 7 Cold. 303; Bissenger v. Guiteman, 6 Heisk. 277; Hicks v. Smith, 4 Lea, 464; Smith v. O'Donnell, 8 Lea, 468; Hawkins v. Lee, 8 Lea, 42; Breeden v. Grigg, 8 Baxt. 163; Waterbury v. Russell, 8 Baxt. 162; Brady v. Isler, 9 Lea, 356; Barnard v. Roane Iron Co., 85 Tenn. 139.

Parol evidence is admissible as to collateral matters not varying the terms of the writing, such as fraud in the soundness of an article, when the written warranty extends only to title: McFarlane v. Moore, 1 Over. 174; 3 Am. Dec. 752; Lytle v. Bass, 7 Cold. 303. Or when fraudulent representations were made in negotiating the contract: Barnard v. Roane Iron Co., 85 Tenn. 139. Or when representations and statements are made as inducements to the contract, and form the basis or consideration of it: Waterbury v. Russell, 8 Baxt. 162; Hogg v. Cardwell, 4 Sneed, 157.

In Betts v. Demumbrune, Cooke, 48, the written contract was for the rent of a tavern. It was permitted to be shown by parol that the landlord agreed to erect a kitchen on the ground, that this was an inducement to rent the tavern, and only part of the contract was in writing.

155 In *Vanleer v. Fain*, 6 Humph. 104, it was held that, in a written contract for the hire of a slave, parol evidence could be introduced to show that one of the terms of the hiring was that the slave should not be removed out of the county.

In *Leinau v. Smart*, 11 Humph. 308, there was a written contract for the sale of a tavern. It was permitted to show by parol as part of the same agreement and inducement to it, that the vendor would close up another tavern he owned in the same town.

In *Dick v. Martin*, 7 Humph. 263; parol evidence was allowed to prove an agreement to waive demand and notice of negotiable paper, although made at the time of the indorsement, which was full and dated.

In *Mitchell v. Planters' Bank*, 8 Humph. 216, it was permitted to be shown by parol that the cashier of a bank informed the directors that one of the makers had promised the indorser's name on the note, the evidence being treated as part of the *res gestae*.

In *Cobb v. O'Neal*, 2 Sneed, 439, there was a written warranty of the soundness of a slave. It was permitted to show by parol that the vendee agreed to look to a third person, and not to the warrantor, in case of a breach, in consideration of an abatement in price.

In *Bryan v. Hunt*, 4 Sneed, 543, 70 Am. Dec. 262, it was held that the general rule, excluding parol evidence, has no application to agreements made subsequent to the execution of the written contract.

156 In *Cobb v. Wallace*, 5 Cold. 539, 98 Am. Dec. 435, there was a written contract for the hire of a coal barge. It was allowed to prove by parol that it was hired for one particular purpose and trip only, and the question whether the writing embraced the whole contract was for the jury.

In *Lytle v. Bass*, 7 Cold. 303, a note was given for a sawmill. It was permitted to show, as a separate collateral, substantive agreement that the vendor warranted the sawmill.

In *Bissenger v. Guiteman*, 6 Heisk. 277, it was held that it was competent to show by parol that, at the time a promissory note was executed, it was agreed it should be held for nothing on the happening of a specific condition.

In *Hicks v. Smith*, 4 Lea, 463, there was a mortgage, and it was permitted to show by parol that Thomas should have priority when it was satisfied, though the mortgage did not so provide.

In *Hawkins v. Lee*, 8 Lea, 42, it was allowed to add terms to a written contract by parol, to the effect that plaintiff was to work

at a particular place, and not remove his tools therefrom, and other conditions.

In *Smith v. O'Donnell*, 8 Lea, 468, it was held that a contract might be part in writing and part in parol, and in such case parol evidence was admissible.

In *Breeden v. Grigg*, 8 Baxt. 163, it was held ¹⁵⁷ that parol evidence is admissible to prove conditions upon which a written contract was made.

In *Waterbury v. Russell*, 8 Baxt. 162, there was a sale of corn contract in writing. It was permitted to be shown by parol that the corn was represented to be sound as an inducement to the written contract.

In *Brady v. Isler*, 9 Lea, 357, it was held that parol proof may be allowed to show whether a written contract was in fact made, or whether it was to take effect only on certain conditions.

In *Barnard v. Roane Iron Co.*, 85 Tenn. 139, it was held that, in a proceeding by a vendor to rescind a contract for the sale of land, on the ground of fraud, parol evidence of the fraudulent representations of the vendee, made in negotiating the contract, is admissible, the purpose being to show that the vendor was entrapped into an agreement that he otherwise would not have made.

The general rule, as well as the different cases in which it does not so apply as to exclude parol evidence, is forcibly stated and fully commented on in *Ferguson v. Rafferty*, 6 L. R. Ann. 33, and notes; *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 438; 17 L. R. Ann. 270, and notes.

It must be admitted that, in the multitude of exceptions to the general rule, much confusion has arisen, not only in our state, but elsewhere, so that the exact limit to be placed upon the exceptions depends not only upon the peculiar facts of each case, but also, to some extent, upon the peculiar ¹⁵⁸ cast of thought of the individuals composing the court, as is substantially said in *Richardson v. Thompson*, 1 Humph. 154.

Nevertheless, the exceptions are as well sustained and based upon authority as is the general rule, and there remains only the application of the rule and its exceptions to each case as it arises. Looking to the case as presented in this record, it is evident, at a glance, that the written contract set out only relates to the obligation and undertaking imposed upon the tenant, and it makes not the remotest reference to any act to be done or obligation assumed or representation made by the landlord, so that if the landlord agreed to do anything to the premises to make them safe,

or represented that he had made them safe, which induced the plaintiff to make the contract, or which was to be a part of the contract, it was not embraced in the writing. Indeed, the record shows that not all the requirements made of the tenant are embraced, for the parol evidence, as well as the note filed, shows that it was one of the vital terms of the contract that Mrs. Hines should bind her separate estate for the payment of the notes, and that she did attempt to do so in the notes. This was an independent collateral agreement to the contract of rental, and an inducement to make it not embraced in the lease contract which was written.

We are of the opinion it was error to exclude evidence tending to show that the defendant agreed to ¹⁵⁹ put the premises in safe condition, if such were made before the contract was closed, and also evidence tending to show that, at the time the contract was signed, defendant or his agent represented that they had been put in a safe condition, as promised. The learned trial judge, however, excluded the evidence also upon another ground, and that was because, in his opinion, the evidence offered did not go to the extent of setting up a distinct collateral agreement to make the premises safe, or an assurance that they had been made safe, but that the evidence only went to show complaints about the sanitary condition of the premises and promises in regard to the grates and windows and other minor details, and assurances only as to them. The most material evidence upon this question is that of plaintiff, which is somewhat indefinite. She does not, in her evidence, mention the porch, and does refer to the windows and grates and general sanitary condition of the premises; but she also says that the promise was to put the house in good repair—safe repair.

The question as to whether the entire contract was reduced to writing, or an independent collateral agreement was made, was a question of fact, and where there was any evidence to sustain the contention, it was a matter for the jury to determine, and not for the court: *Cobb v. Wallace*, 5 Cold. 540; 98 Am. Dec. 435; *Stewart v. Phoenix Ins. Co.*, 9 Lea, 104, 112. We think it was, therefore, error in the trial judge ¹⁶⁰ to determine these questions and exclude all evidence in regard to them.

The court charged the jury, among other things, substantially, that if the landlord knew the unsafe condition of the premises, and concealed the fact from the tenant, and that she did not know of their unsafe condition, or could not have known by the exercise of proper care and diligence, then she could recover, etc.

It will be noted that the learned trial judge, in this charge, makes the tenant responsible not only for the facts known to her, but also such as she could have known by the exercise of proper care and diligence; but he only holds the landlord responsible for his actual knowledge, not for such knowledge as he might have had by the exercise of proper care and diligence.

We think the great weight of authority is, that if a landlord lease premises which are, at the time, in an unsafe and dangerous condition, he will be liable to his tenant for damages that may result, if he knows the fact and conceals it, or if, by reasonable care and diligence, he could have known of such dangerous and unsafe condition, provided reasonable care and diligence is exercised by the tenant on his part: Taylor on Landlord and Tenant, 7th ed., sec. 175; 2 Wood on Landlord and Tenant, 854, and note; Shearman and Redfield on Negligence, secs. 709, 711; Cowen v. Sunderland, 145 Mass. 363; 1 Am. St. Rep. 469; Coke v. Guthkese, 80 Ky. 598; 44 ¹⁶¹ Am. Rep. 499; Cesar v. Karutz, 60 N. Y. 229; 19 Am. Rep. 164; Lowell v. Spaulding, 50 Am. Dec. 780, note; Woodfall on Landlord and Tenant, 12th ed., 707; Godley v. Hagerty, 20 Pa. St. 387; 59 Am. Dec. 733; Carson v. Godley, 26 Pa. St. 111; 67 Am. Dec. 404; Edwards v. New York etc. R. R. Co., 98 N. Y. 249; 50 Am. Rep. 659; Gill v. Middleton, 105 Mass. 477; 7 Am. Rep. 548. The same principle is held in our own case of Young v. Bransford, 12 Lea, 244, citing 1 Thompson on Negligence, 317; Wharton on Negligence, secs. 817, 845. See, also, Timlin v. Standard Oil Co., 126 N. Y. 514; 22 Am. St. Rep. 845; Ahern v. Steele, 115 N. Y. 203; 12 Am. St. Rep. 778; Maywood v. Logan, 78 Mich. 135; 18 Am. St. Rep. 431; Lindsey v. Leighton, 150 Mass. 285; 15 Am. St. Rep. 199; 12 Am. & Eng. Ency. of Law, 687, 691, note.

This is not in conflict with the general rule that, in the absence of any stipulation or statement, there is no warranty that the premises are in a habitable condition, and no obligation to repair, as held in Southern Oil Works v. Bickford, 14 Lea, 657, and Banks v. White, 1 Sneed, 614, but the cases proceed upon the idea that the premises, when leased, are unsafe, and that fact is known to the landlord, and concealed by him from the tenant, or might have been known by him by the exercise of reasonable care and diligence. The liability does not arise upon any question of contract, but upon the obligation to the tenant not to expose him to danger of which the landlord knows, or could know by ¹⁶² reasonable care, nor is it done away with by the fact that the parties examined the premises, and the tenant did

not discover the defect if he exercised reasonable diligence. This view of the case was presented in the second count of plaintiff's declaration. Upon this feature of the case, the learned trial judge charged the jury, among other things: "If the plaintiff had any right to recover, her right must depend upon what took place after the plaintiff took possession of the premises and before the accident occurred."

Without going further into the case, and without commenting on the vast array of authorities presented by the defendants' attorneys in support of the trial judge's positions, some of which are in conflict with the views herein given, we think the judgment of the court below must be reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

A REHEARING of the principal case was granted and is reported under the title of *Hines v. Wilcox* and *Stenberg v. Wilcox*, 96 Tenn. 328. In this case the court reaffirmed its former decision and said:

"The rule, as laid down by this court, imposes reasonable care and good faith on both landlord and tenant, in the absence of a contract to make the premises safe or a warranty of their condition, and, keeping this rule in view, the tenant and his boarder are entitled to as much protection against the landlord as is the stranger passing along the street or occupying adjoining premises. It cannot be the law that the owner of a hotel which is in an unsafe condition, known to him to be so, or by reasonable care and diligence he could know, can lease it to a tenant, who exercises reasonable care and diligence, and does not discover the danger, and then escape liability to either the keeper of the hotel or his family or servants or the persons who enter the hotel for its accommodation. What the hotel keeper's liability may be, at the same time, is not a question now before us.

"The rule laid down by this court and, as we think, sustained by authority and reason, is that, in the absence of a contract to repair or warranty of condition, both the landlord and tenant must use reasonable care and diligence. If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or, knowing their condition, assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe, or if he actually know they are unsafe, and conceals or misrepresents their condition, then he is liable, the tenant being in no fault. It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know, and cannot ascertain by the exercise of reasonable care and diligence.

"The cases are numerous which use the expressions laid down in

the opinion in this case, that the landlord is liable not only for actual knowledge, but also for reasonable care and diligence in obtaining such knowledge; not only when he knows, but when he ought to know, of the defects by using ordinary care and diligence. As using this expression we cite, among others, *Martin v. Richards*, 155 Mass. 381; *State v. Boyce*, 73 Md. 469; *Carson v. Godley*, 26 Pa. St. 111; 67 Am. Dec. 404; *Coke v. Guthkese*, 80 Ky. 598; 44 Am. Rep. 499; *Lindsley v. Leighton*, 150 Mass. 288; 15 Am. St. Rep. 199; *Moynihan v. Allyn*, 162 Mass. 272. Under the principle we have attempted to lay down the landlord's liability (leaving the contract of lease out of view) is the same to the tenant as to his servant, or his guest or his customer, or his wife or child, or to the stranger passing along the streets, or on the premises for any legitimate purpose.

"The only case cited by counsel apparently holding a doctrine contrary to that laid down by this court is that of *Brudick v. Cheadle*, 26 Ohio St. 393; 20 Am. Rep. 767. This case is also reported (in a note) in 50 Am. Dec. 782, and referred to as a peculiar case, and, as we think, very justly criticised as placing the party injured in a very anomalous position. The case is clearly out of line with the current of authority. It may be remarked, however, that in that case the court said: 'Whether the noxious structures existed at the time the lessees entered into possession of the storeroom does not appear.'

"As illustrative of the application of the rule we have laid down, we cite the following, among other cases, showing when the rule is applied, and as to what persons held applicable: In *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, a longshoreman in the service of the tenant sued the owner and recovered. In *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 733, a servant of the tenant sued the owner and recovered. In *Carson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404, a customer of the tenant sued the owner and recovered. In *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164, the owner was held liable to the child of the tenant. In *Coke v. Guthkese*, 80 Ky. 598, 44 Am. Rep. 499, the owner was held liable for injuries sustained by a child of the tenant. In *Martin v. Richards*, 155 Mass. 381, three cases were tried together, and the owner was held liable for an injury to the child and wife of the tenant. In *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122, three cases were tried together, and the owner was held liable for injuries to the tenant's children. In *State v. Boyce*, 73 Md. 469, the owner was held liable for injuries to the servant of the tenant. In *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, the owner was held liable for an injury to the wife of the tenant. In *Nugent v. Boston etc. Ry. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, the owner was held liable to persons rightfully on the premises. In *Nelson v. Brewing Company*, L. R. 2 C. P. Div. 311, the right of the servant of the tenant to sue was recognized. In *Moynihan v. Allyn*, 162 Mass. 272, the right of the child of the tenant to sue was recognized."

EVIDENCE—INDEPENDENT PAROL AGREEMENT.—A parol agreement which is collateral to, but not inconsistent with, a written agreement on a distinct subject matter may be proved: *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 436. Where a writ-

ten agreement is silent on the subject, in the absence of fraud or mistake, parol testimony is admissible to show a contemporaneous parol agreement as to the time during which the written agreement was intended by the parties to continue in force: *Real Estate etc. Co's Appeal*, 125 Pa. St. 549; 11 Am. St. Rep. 920, and note. See, also, the extended note to *Green v. Batson*, 5 Am. St. Rep. 197, and *Sullivan v. Lear*, 11 Am. St. Rep. 394.

LANDLORD AND TENANT—LIABILITY FOR DANGEROUS PREMISES.—A landlord is answerable for defects in the premises of which he has no actual knowledge and through which his tenants are injured: *Lindsey v. Leighton*, 150 Mass. 285; 15 Am. St. Rep. 199, and note. A landlord is liable to his tenant for injury arising from the fact that the premises contain some hidden defect or defects of which the landlord had some knowledge or information, but which were not open to the view of the tenant and of which he was ignorant: *Hamilton v. Feary*, 8 Ind. App. 615; 52 Am. St. Rep. 485, and note. See, also, the extended note to *Lowell v. Spaulding*, 50 Am. Dec. 776.

EICHENGREEN v. RAILROAD.

[96 TENNESSEE, 229.]

FALSE IMPRISONMENT—LIABILITY OF MASTER FOR ACT OF SERVANT.—Arrest and imprisonment of an innocent person procured by a railroad detective, acting within the scope of his authority, renders the company liable, although he exceeded his authority and acted contrary to instructions.

FALSE IMPRISONMENT—LIABILITY OF PRINCIPAL FOR ACT OF AGENT.—An express order for an unlawful arrest by an agent is not necessary to fix the liability of his principal, when the arrest is procured by such agent, acting within the scope of his authority, though contrary to instructions.

J. W. Blackmore, G. W. Boddie, and S. F. Wilson, for the appellant.

J. J. Turner and Dismukes & Seay, for the appellee.

²³⁰ McALISTER, J. The plaintiff sued the defendant company in the circuit court of Sumner county to recover damages for an alleged false imprisonment. There was a verdict and judgment in favor of the plaintiff for one dollar. The plaintiff appealed, and has assigned errors.

The plaintiff, Eichengreen, was a drummer, representing a Philadelphia firm engaged in the manufacture of soaps. On reaching the town of Gallatin, Sunday evening, August 9, 1891, he was arrested by two policemen as he stepped from the train of defendant company. The arrest was made in pursuance of a telegram sent from Bowling Green, Kentucky, by one W. J. Stewart, who was in the employment of defendant in the capacity of a special agent or detective. The record discloses that the plaintiff, Eichengreen, had for several days been in Bowling

Green, and, desiring to go to Gallatin, Tennessee, he went to the railroad ticket office to purchase a ticket. In payment of his ticket, he handed the agent a five dollar bill, which the latter pronounced counterfeit. Eichengreen explained that he had received the bill from one of the banks in Bowling Green, and remarked to the agent, "You are off!" He then handed the agent a twenty dollar bill, and received his change. Stewart, the special agent or detective of the company, claims that he was standing near and overheard the conversation between the ²³¹ plaintiff and the ticket agent at Bowling Green; that the plaintiff was in company with one Newmark, and that plaintiff, Newmark, and himself all boarded the train at Bowling Green, going south. Stewart further stated that on the train the plaintiff and Newmark talked a good deal in a foreign language; that they exchanged coats, and one of them asked him (Stewart) if there was not a train out of Gallatin that night about 10 o'clock. Stewart testified that these facts aroused his suspicions, and he came to the conclusion these men were crooks. He thereupon sent to the telegraph operator at Gallatin the following dispatch:

"Tell your police authorities to meet me at depot. A man on train with counterfeit money going to get off at your station. Tried to pass five dollars of it at Bowling Green.

(Signed)

"W. J. STEWART."

As already stated, on the arrival of the train at Gallatin, Eichengreen and his companion, Newmark, were both arrested. It was claimed by plaintiff that they were pointed out by Stewart and the conductor of the train to the policeman who made the arrest. The prisoners were both taken to the city workhouse, where Newmark was released upon assurances from Eichengreen that the former had nothing to do with the matter, and, if anyone was guilty of attempting to pass counterfeit money, he was the man. Eichengreen, after much trouble, and possibly two ²³² hours' detention, was permitted to deposit his watch and money with the city marshal as security for his appearance at the police court the following morning. It appears that no warrant was sworn out against the defendant, and, there being no proof against him, he was, the next day, discharged. Thereupon, the plaintiff commenced this suit against the company for damages for false imprisonment. On the trial it was shown that the five dollar bill Eichengreen attempted to pass at Bowling Green was counterfeit, but the latter testified that he had no knowledge of the counterfeit, explaining that while in Bowling Green he had boarded with one McLure; that he, Eichengreen, drew a draft on his house

in Philadelphia for fifty dollars, and McLure had it cashed for him at a bank in Bowling Green; that among the bills paid McLure by the bank, and turned over by the latter to the plaintiff, was the five dollar bill in question. Stewart, the special agent or detective of the company, stated on the trial that he heard Eichengreen, the plaintiff, tell the ticket agent at Bowling Green, when the bill was refused, that he had gotten it from one of the banks at Bowling Green. It was insisted on behalf of the company that the arrest of plaintiff was not procured by Stewart, or any employe of the company, but, if it was, such act was not within the apparent or real scope of the agent's authority, and the company is not liable.

In respect of the first proposition, there was evidence tending to show that, on the arrival of the ²³³ train at Gallatin, the conductor of the train pointed out the plaintiff to the policeman, who immediately arrested him. About this time Stewart, the detective of the company, came up, and said to the policeman, "Why have you not arrested the other one? There are two of them," and pointing to Newmark, the policeman arrested him. It further appears that Stewart, after the arrest of these parties at the depot, Sunday evening, proceeded on his way to Nashville and sent back the following telegram to the operator at Gallatin, viz:

"Let me know what the officers found on those fellows. They tried to pass twenty dollars at Louisville yesterday. They are good stock if the officers work it. They intended to work the town to-night and get out on first train.

"STEWART."

The record shows that Stewart also returned to Gallatin the next morning to learn, as he claims, whether any counterfeit money had been found on the prisoners. There was other evidence tending to show Stewart's complicity in the arrest of the plaintiff. On the subject of Stewart's authority to make arrests, it was shown on the trial that he was the chief of special agents or detectives employed by the company. These detectives were employed for the purpose of protecting the property of the company, and of ferreting out and prosecuting parties guilty of crimes against the company. Stewart, it seems, had general instructions from the officers of the company not to make arrests without first consulting the local attorneys of the road. It ²³⁴ was shown, however, that he was authorized to make arrests when the proof against the party was clear and there was not time to consult local counsel lest the criminal might escape. The plain-

tiff, who was following the business of a drummer, had visited Gallatin on previous occasions, and was, as already stated, well known to some of the merchants of that city, and, by them and others, proved an excellent character on the trial below. The jury returned a verdict in favor of plaintiff for one dollar. The result of the verdict is, that the plaintiff is onerated with the payment of a heavy bill of costs, since, by the terms of our statute, the plaintiff, in an action for false imprisonment, recovers no more costs than damages, unless his recovery exceeds the sum of five dollars. This verdict practically absolves the company from all liability, and upon this basis the assignments of error will be considered.

The first assignment is, that the court erred in refusing plaintiff's fourth request, viz., "If you find from the proof that the plaintiff was illegally and wrongfully arrested in Gallatin, August 9, 1891, and that his said arrest was caused or procured by the agents of the company, while acting within the scope of their authority, either express or implied, then the company would be responsible, although the said agents, in procuring or causing his wrongful arrest, were exceeding their authority or acting in the matter contrary to instructions."

We think this assignment well taken, and that the ²³⁵ instruction asked should have been given, especially for the purpose of correcting an affirmative error on this subject in the general charge. The trial judge had instructed the jury that if Stewart was not acting in the capacity of a detective for the company, the defendant would not be liable under any circumstances. He then continues: "But if you find he was so acting, you will next proceed to inquire if he was acting within the scope of the authority conferred upon him by the company, because, if he was acting as such detective of the company, if he at the time was exceeding his authority, then he would be liable and not the company." This instruction was erroneous, for the law is, that if the agent is acting within the scope of his employment, the master is liable, although the particular act may have been in excess of his authority and directly contrary to instructions. Says Mr. Wood, in his work on Master and Servant, section 307, viz: "It is not necessary, in order to fix the master's liability, that the servant should, at the time of the injury, have been acting under the master's orders or directions, or that the master should know that the servant was to do the particular act that produced the injury in question. It is enough if the act was within the scope of his employment, and, if so, the master is liable even though

the servant acted willfully and in direct violation of his orders. A master cannot screen himself from liability for an injury committed by his servant within the line of his employment, by setting ²³⁶ up private instructions or orders given by him and their violation by the servant. By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are willful and directly antagonistic to his order. . . . The master can never escape liability for an abuse of an authority by the servant; therefore, the question always is, whether there was any authority, express or implied, on the part of the servant to do the act": See, also, Wood on Master and Servant, sec. 309. Again, the same author, at section 299, says: "The question is, not whether the particular act was authorized, but whether the act done grew out of the exercise of an authority which the master had conferred upon the servant. In other words, whether it is an incident to the authority granted and done in the line of the servant's duty." The author then illustrates the principle with a case bearing some analogy to the case at bar. "Thus," says the author, "it would be absurd to hold that a person who has employed a detective to discover and arrest persons committing certain depredations upon his property could only be chargeable for arrests legally made by him, upon the ground that the employer must be presumed to have only employed him to act in a legal manner and upon legal grounds. Having employed the detective to make arrests at all, it intrusts him to make any arrests in the line of his duty which he deems advisable, and, if he makes an ²³⁷ illegal or improper arrest, the employer is responsible therefor."

Thus, in the *Indiana* case, *Evansville R. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102, the railroad company employed a detective to detect, arrest, and prosecute persons who unlawfully obstructed its railway, and in the performance of his duties he, without legal authority, arrested the plaintiff, who was an innocent person. It was held that the company was liable for the false imprisonment of the plaintiff by the detective: *Lynch v. Metropolitan R. R. Co.*, 90 N. Y. 77; 43 Am. Rep. 141; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; 34 Am. Rep. 495; *Goff v. Great Northern R. R. Co.*, 30 L. J. Q. B. 148; 1 Am & Eng. Ency. of Law, 415, note 2; *Cantrell v. Colwell*, 3 Head, 471; *Byram v. McGuire*, 3 Head, 530; *Deihl v. Ottenville*, 14 Lea, 191.

The record discloses that Stewart, the special agent or detective of defendant company, was employed to look after any irregularities that he saw on the line of the road or divisions, investigate

cases of robbery, obstructions on the track, and crimes against the company; that when a depredation of any character had been committed, it was in the line of his duty to investigate it thoroughly, get all the information he could about it in his own way, and then go to the company's attorney and take advice in respect of the proper course to pursue. But there was also evidence tending to show ²³⁸ that if the detective caught parties in the act of breaking into a depot, or breaking into a car, or placing obstructions on the track, or doing any kindred act, when there was not time to consult anybody, and the party might escape, then he would have a right to make an arrest. So it is obvious from this evidence that this detective was especially charged with the apprehension and prosecution of parties committing offenses against the company, and while, under general instructions, it was the duty of the agent to consult the local attorney before making an arrest, it is shown that in certain emergencies the authority of the agent to make an arrest without such consultation was recognized. The attempt to pass a counterfeit bill upon the ticket agent was certainly an offense against the company, and having been committed in the presence of this detective, the right to arrest, or procure the arrest of, the guilty party, may fairly be said to have been in the line of his employment, and within the authority conferred upon him. But the agent was bound, at the peril of the company, to know that the accused party was in the act of committing a crime, and not innocently passing the bill, and not himself the victim of the counterfeit. The record discloses that this detective was in the habit of exceeding his authority in making arrests, and this fact was known to the company. In November, 1888, he arrested two persons at Birmingham, and had them lodged in jail. Mr. Harrah, at that ²³⁹ time general manager of the company, wrote to him, viz: "You must be very careful hereafter, and not make any arrest without first consulting our attorneys, and getting their opinion as to the company's case. I would rather that the arrest should not be made than that the company should get into any trouble over having made an arrest without being able to establish a case against the party or parties arrested. Please bear this in mind in future." This letter serves to illustrate the character of Stewart's employment, and the manner in which he exercised his authority, and also fixes knowledge of that fact upon the company. We are, therefore, of opinion the circuit judge erred in refusing the instruction asked.

Assignments of error are also made upon certain instructions

given the jury at the request of defendant's counsel. The first instruction was, viz: "If Stewart simply telegraphed the operator to notify the police that a man was on the train who had passed, or attempted to pass, counterfeit money, then that would not authorize the police to arrest him, unless he was directed to do so by an agent who had authority to act in such a matter." This instruction, in the opinion of the court, was misleading, since it does not give the entire import of the telegram. The message from Stewart, it will be remembered, begins, viz: "Tell your police authorities to meet me at the depot," and there was evidence tending to show that, upon the arrival of the ²⁴⁰ train, Stewart and the conductor pointed out the two suspects to the policemen. Again, the instruction is erroneous, in that the liability of the company for the arrest is made to depend upon the order or direction of the agent, when the company would be equally liable if the agent procured the arrest, or set in motion the machinery by which the arrest was made, although not expressly ordering or directing it.

For the same reason, we think the following instruction, submitted to the jury at the request of defendant's counsel, was also misleading, to wit: "If W. J. Stewart was ordered by his employer to not arrest parties, but to report the same to the railroad authorities, unless in an urgent case of wrong to the company, and if Eichengreen simply offered to pass a counterfeit bill at Bowling Green, then, unless said Stewart ordered his arrest or swore out a warrant against the plaintiff, the defendant would not be liable in this case."

For the same reason, the ninth request of defendant's counsel should not have been given in charge to the jury. In this latter instruction, the court sets out the telegram sent by Stewart to the operator at Gallatin, and instructs the jury that it would not authorize the plaintiff's arrest unless Stewart or some one of defendant's employes ordered it. It is not necessary that the arrest of plaintiff should have been expressly ordered by any agent of the company, but if it appear that it was procured by ²⁴¹ any agent of the company, acting within the scope of his employment, the company would be liable.

It is also assigned as error that the circuit judge, in explaining the measure of damages, used this expression, viz: "You will consider these things upon the question of damages, if you ever get to that point," etc. It is objected that this expression was improper, since it was calculated to convey to the mind of the jury the impression that, in the opinion of the court, there would be

difficulty on the part of the jury in reaching the assessment of damages. But we do not feel called upon to determine this question or other errors assigned, as they may not arise on a new trial in the objectionable form in which they are now presented.

The judgment is reversed, and the cause remanded for a new trial.

MASTER AND SERVANT—WRONGFUL ARREST.—If an employee of a railway company has general authority to act for his employer in the capacity of a detective officer and such authority includes expressly or by general usage and consent the power to make an arrest in the employer's behalf, the mode of execution of such power with warrant or without is immaterial, and the employer is liable for a wrongful arrest: *Duggan v. Baltimore etc. R. R.*, 159 Pa. St. 248; 39 Am. St. Rep. 672, and note with the cases collected.

STATE v. COPELAND.

[96 TENNESSEE, 296.]

PUBLIC OFFICERS—RESPONSIBILITY AS TO PUBLIC FUNDS.—A public officer intrusted with public funds is not an insurer against their loss and is responsible only for the exercise of good faith, diligence, prudence, and caution for their safekeeping.

PUBLIC OFFICERS—RIGHT TO DEPOSIT PUBLIC FUNDS IN BANK.—A public officer intrusted with public funds who deposits them in a bank of undoubted standing and reputation at the time of deposit, without interest or profit to himself, is not guilty of negligence nor want of proper business prudence and caution as to their preservation so as to render him liable for their loss upon the failure of such bank.

PUBLIC OFFICERS—RELATION OF TO PUBLIC FUNDS. A public officer intrusted with public funds is not a debtor as to them, nor has he the right to use them in any way except for the purpose of the trust, and he holds them, not strictly as a special bailee, but as a trustee, clothed with legal duties and liabilities as such.

PUBLIC OFFICERS—LIABILITY AS TO PUBLIC FUNDS. The measure of the liability of a public officer for the safety of public funds intrusted to him is fixed by the laws relating to his office, and not merely by the terms of his official bond.

Vertrees & Vertrees, J. A. Barnes, W. W. Goodpasture, and W. H. Hussey, for the appellants.

G. B. Murray, for the appellee.

297 WILKES, J. This is a bill against the defendant, Hardy Copeland, and others, as sureties upon his official bond as county trustee of Overton county, for school taxes deposited by him in the Nashville Savings Company, at Nashville, Tennessee, called in the record and generally known as Marr's Bank. Upon the hearing, the chancellor gave judgment against the defendants for

\$3,119, and interest from October 12, 1895, and all costs, and the defendants have appealed and assigned errors.

These assignments are as follows: 1. In finding that Mr. Copeland was not sufficiently careful and diligent; 2. In holding that Mr. Copeland should have acted only upon an examination of the bank, made, or caused to be made, or upon knowledge; 3. In holding ²⁹⁸ that Mr. Copeland, as trustee, was bound, in law, to account for and pay over this fund, unless it was lost by the act of God or the public enemy; 4. In rendering a decree against Mr. Copeland and his sureties for the full penalty of the bond, to be discharged upon the payment of \$3,119 and interest; 5. In rendering a decree against the defendants for said \$3,119, interest, and cost; 6. In not rendering a decree dismissing the bill.

Only two real questions are presented, the first of which is, whether Copeland was an insurer of the safety of the funds in his hands, and the other, whether, if not an insurer, he exercised that degree of care that he should have done for the safekeeping of the funds in his hands. We consider the first proposition primarily, for if it be held that the trustee is liable for such funds in every event and under all contingencies, except when the loss arises from the act of God or the public enemy, then the latter question is immaterial, and need not be considered.

The learned chancellor in the court below delivered a written opinion, from which the reasons and grounds of his decision may be gathered. He says: "I am fully satisfied that Copeland did not intend or expect to lose the money when he placed it in Marr's Bank, and he believed it was safe there until a very short time before the bank failed, and perhaps up to the day of its closing." The chancellor then adds: "In the view I take of the ²⁹⁹ case, conceding that Copeland acted in good faith, believing that this bank was entirely safe, the question is, Can a trustee make such a defense avail him in case the money is lost by the failure of the bank?" And the chancellor finally says: "I am constrained to hold that the defendant, Copeland, and his sureties, are responsible for the money under the facts of this case, both upon the ground that the defense set up in the answer—that the bank had a good reputation, was an old bank of high standing, that the deposit was made in good faith and confidence, and lost by the failure of the bank, and without negligence on the part of Mr. Copeland—was not good in law, and also that the facts do not establish that high degree of diligence that would excuse defendants from accounting for the money, even under the rule requiring the faithful discharge of duty. . . . This is not a ques-

tion of intent. It is a question of diligence or negligence in a legal sense."

The question of the measure of liability of a public officer for funds in his hands is one of prime importance, and, at the same time, one upon which there is some diversity of opinion. In some cases, the liability of the officer is made to turn upon the terms of his bond, and it is construed as having been enlarged and made an absolute engagement to pay over the money in any event and under every contingency. In other cases, the officer is regarded as a debtor for the funds that go into his hands, ³⁰⁰ and not a bailee or trustee of such funds. In other cases, the officer is held liable on broad grounds of public policy, and the obligations resting upon him are made absolute and unconditional, because a different construction would open up a door for fraudulent practices and evasions by public officials. The matter is forcibly presented in the notes to *State v. Harper*, 67 Am. Dec. 363-373; and also in the case of *Wilson v. People*, 19 Colo. 199, 41 Am. St. Rep. 243, 22 L. R. Ann., 451, and notes, where the several grounds of liability are referred to, and the cases cited under each.

Considering these grounds of liability in the order named, it is evident that the terms of the bond must have some weight in determining what the liability of the officer is. But the main object of the bond, under our law, is not to fix the limit of the officer's liability, but to superadd the security of the bondsmen to that of the principal. The liability of the bondsmen is outlined in the bond, but after all, the extent of liability of both principal and securities, and the obligations they are under, are fixed and limited by the statutes and laws relating to such officers.

The bond required of the county trustee, to cover school funds, is a special one: *Milliken and Ventrees' Code*, sec. 712.

The bond executed by defendant is in these words: "Now, therefore, should the above-bounden Hardy Copeland truly and faithfully perform the duties of ³⁰¹ the office of county trustee for the term of his office, and shall faithfully collect and pay over, within the time and in the manner as prescribed by law, to the proper officer designated by the laws of Tennessee to receive the same, all school taxes by him collected, or that ought to be collected during his said term of office, then this obligation to be void; otherwise, to remain in full force and effect."

The oath required of the officer is to the same effect as the bond: *Milliken and Ventrees' Code*, sec. 716. The trustee is required to keep the school funds separate from all others: *Milli-*

ken and Ventrees' Code, sec. 1167. And to use it directly or indirectly, or to receive, or agree to receive, any fee or interest from any bank for the deposit or use of the money, is made a felony: Acts of Extra Session 1885, c. 16.

The bond does not, in terms, fix the extent of the officer's liability. That is regulated by law, and we are of opinion that there is nothing in the terms of the bond or the requirements of the statutes that makes the officer liable, as on contract, to keep, at all hazards, and under every contingency, and to pay over funds in his hands, but he is only obligated to pay according to law. Can he, under our law, be held as a debtor for the fund, and, hence, liable for it in any event? If so, he is impliedly given the right to use the funds, to receive and retain interest upon them, and to use them as his own. In the cases holding this doctrine, it is laid down that if the officer make a profit or interest ³⁰² by using the funds, he is not liable therefor, but the usufruct belongs to him. This is certainly not the theory of our law, which makes it a felony for the officer to use it directly or indirectly, or to receive, or agree to receive, any interest from any bank for the use or deposit of it; and not only is it contrary to the statute, but in our view it is unwise policy to consider the officer as a debtor. He is a trustee, charged by statute with certain duties and responsibilities, but having no right to use the funds for his own purpose or to make them his own.

The third class of cases so construes the bonds, and so fixes the duties of public officers holding public funds, as to make them insurers of the safety and forthcoming of the fund, upon broad grounds of public policy. The leading case holding this doctrine of strict accountability is that of *United States v. Prescott*, 3 How. 578. In that case, the bond was conditioned to keep safely and pay over when required to do so, and the court held the officer liable, although the funds were stolen without fault on the part of the officer. This was followed in *United States v. Dashiel*, 4 Wall. 182, where the condition of the bond was to pay over and account; and in *Boyden v. United States*, 13 Wall. 17, where the condition of the bond was to discharge all the duties, and, under the act of Congress, it was the duty of the officer to pay over. This was followed by the case of *United States v. Morgan*, ³⁰³ 11 How. 154; *Bevans v. United States*, 13 Wall. 56; *United States v. Keebler*, 9 Wall. 83; *United States v. Watts*, 1 N. Mex. 553; *State v. Nevin*, 19 Nev. 162; 3 Am. St. Rep. 873.

The rule has been followed in many cases in the state courts, and evidently on the authority of the leading case. We cite only

a few, by way of illustration. In *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322, the bond was "to perform all the duties," and the statute made it a duty to "deliver to his successor all money," and the officer was held liable for depositing money, as treasurer, in a bank of high standing that subsequently failed. In *Omro Supervisors v. Kaime*, 39 Wis. 468, the bond was "to faithfully discharge the duties," and "properly and legally disburse and pay all moneys," and the officer was held liable for a deposit in a bank of good reputation, but which afterward failed. In *State v. Croft*, 24 Ark. 550, the condition was "safely to keep the money," and it was lost by failure of a bank reputed to be good, and the officer was held liable: See other cases cited in 22 L. R. Ann. 451; *Wilson v. People*, 19 Colo. 199; 41 Am. St. Rep. 243, notes; *State v. Harper*, 67 Am. Dec. 363, and notes; 2 Am. & Eng. Ency. of Law 4661, 466 m, notes 1, 2.

It is evident that the chancellor followed the rule laid down in *United States v. Prescott*, 3 How. 578, and cases in harmony with it, and held defendants liable on grounds of public policy. He says: "Ruin will ³⁰⁴ occasionally fall upon an innocent man, but better this than to open a door for the escape of a dishonest custodian of the means, wrung from the honest taxpayer, for the support of the government and the education of the children."

On the other hand, and holding a modified or contrary doctrine, may be cited the case of *United States v. Thomas*, 15 Wall. 337, decided in 1872, in which the case of *United States v. Prescott*, 3 How. 578, was limited, and it was held that an officer would be excused by the act of God or the public enemy. It is there said: "The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have custody of property, public or private. If, in any case, a more stringent obligation is desirable, it must be prescribed by statute, or exacted by express stipulation." And again: "Where, however, a statute merely prescribes the duties of an officer—as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority—it cannot, without more, ³⁰⁵ be regarded as enlarging or in any way affecting the degree of his responsibility."

By an act passed in 1866, the Congress of the United States provided "that officers who lose public funds without fault or negligence may present the matter to the court of claims, and, if that court find the fact to be that way, it shall be so certified, and the officer shall be given credit by the treasurer in his accounts." Since then it has also been provided that certain classes of officers, like revenue collectors and clerks, shall deposit the funds in banks—designated depositories of the United States. Consequently, it appears that when the act of 1866 and the decision in *United States v. Thomas*, 15 Wall. 337, are considered, the rule of liability with respect to United States officers is, that they are not liable for public funds lost without fault or negligence on their part. It is evident that the rule laid down in *United States v. Prescott*, 3 How. 578, was considered too harsh and exacting, and Congress, by the act of 1866, prescribed a different degree of liability.

There are other cases, however, which have not followed *United States v. Prescott*, 3 How. 578, among which may be cited *York County v. Watson*, 15 S. C. 1; 40 Am. Rep. 675. In this case it appeared that the county treasurer had deposited the public money in his hands in a savings bank. The bank failed, and the money was lost. The bank had a good reputation, and the money was deposited to his credit, as treasurer. The court held that he was not liable. The ³⁰⁶ court stated the rule of liability as to trustees, receivers, administrators, guardians, and the like, and then asks: "If it would be wrong in principle to hold a private trustee responsible for loss which no care of his could have prevented, would it not be equally wrong to hold a public officer responsible under like circumstances?" The question is answered in the affirmative by the opinion.

In the case of *Cumberland v. Pennell*, 69 Me. 357, 31 Am. Rep. 284, the county treasurer had money in his safe in his office. Robbers came in and beat him up, and then robbed the safe. The court below ruled that it was no defense, but, on appeal, the supreme court held that it was a good defense, and that he was not liable. The case is well reasoned, and announces the rule of the common law.

In reviewing the cases which follow *United States v. Prescott*, 3 How. 578, *Virgin, J.*, says, "Notwithstanding the high character of the federal courts, whose decisions are now cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in relation to the new-born public policy, based upon supposed facility for temptation, which de-

positories of the public money are said to possess, for collusive robberies." "For," as said by Redfield, J., in *Bridges v. Perry*, 14 Vt. 262, "we cannot believe that they are founded on any just warrant, either of sound judgment or constant experience." This case was approved in the later case of *Strout v. Pennell*, 74 Me. 262.

³⁰⁷ In Alabama it is held that a tax collector who, without fault, is robbed by irresistible force, is not liable for the money of which he is robbed: *State v. Houston*, 78 Ala. 576; 56 Am. Rep. 59.

The court of appeals of New York considered the question in *People v. Faulkner*, 107 N. Y. 477. In that case it appeared that the surrogate deposited moneys in his hands, which were the proceeds of judicial sales, in a private bank which failed. He received interest on the fund, for the benefit of the litigants, but it was deposited subject to check or demand. The court recognizes the distinction between public funds and private moneys of litigants, and it also reviews the federal cases in the light of the act of Congress of 1866 and the case of *United States v. Thomas*, 15 Wall. 337. The common-law rule of liability was declared to be the true one, and care and good faith to be the measure of liability. As the banker, in that case, was a man of good standing, and there was no negligence, the surrogate was held to be not liable. This case also recognizes the present condition of things—that it is the part of prudence to keep funds in bank, as the best and safest place.

In the case of *Wilson v. People*, 19 Colo. 199, 41 Am. St. Rep. 243, a clerk of a court deposited the money, in his hands as clerk, in a bank of good standing. The bank broke and the fund was lost. It was held that the clerk was not liable. Among other things, the court, through Goddard, J., said: "From the agreed ³⁰⁸ facts, it appears that the money was lost through no fault of the clerk. He deposited the money in a bank of reputed solvency, as clerk of the court, and, in doing so, acted as prudent men ordinarily do with their own funds. The judgment of the court below must, therefore, be upheld, if at all, upon the ground that the condition of his official bond imposed upon him an absolute obligation to pay the money when required, and that no exercise of diligence on his part will exonerate him from such obligation. Such is the contention of counsel for appellee, and, for its support, he relies on the case of *United States v. Prescott*, 3 How. 578, decided by the supreme court of the United States in 1844, as the leading case, and several other cases in that court,

as well as some decisions by state courts which approve and follow the doctrine therein announced. In these cases, in which the rule contended for was sustained, the court had under consideration the liability imposed by the official bond of receivers of public money, and the conclusions arrived at were influenced largely by considerations of public policy. Whether the case at bar is sufficiently analogous to these cases to bring it within the rule therein announced, it is unnecessary to decide, since the supreme court of the United States, in a later case, has very much modified, if it has not, in effect, overruled, the extreme doctrine laid down in its earlier decisions. In the case of *United States v. Thomas*, 15 Wall. 337, Justice Bradley, in speaking of the leading ³⁰⁹ case of *United States v. Prescott*, 3 How. 578, said: 'After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it requires: "The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it, when required, can discharge the bond." This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events. . . . And as the money in the hands of a receiver is not his—as he is only custodian of it—it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law.' And, after reviewing the principal cases relied on by appellee, he further said: 'So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges, in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the ³¹⁰ latter case, the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case. . . . The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt, and the duty secured thereby does not be-

come a debt until default is made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property, which is not his, and which he cannot use for his own purposes.'

"While the majority opinion distinguished the case under consideration from those preceding it, we think the reasoning of the learned justice who wrote the opinion logically and necessarily overrules the doctrine laid down in the former cases. If, as therein announced, the obligation imposed by the bond is absolute, and the officer was an insurer of the money received by him, how could the manner or cause of its loss affect his liability? Wherein is he more at fault when overpowered by one or two robbers than he is when intimidated by an army?

"Justice Miller refused to concur in the majority opinion because it did not frankly overrule those ³¹¹ cases, and abandon the doctrine on which they rested, and, in his dissenting opinion, stated his personal views upon the question, as follows: 'When the case of *United States v. Dashiell*, 4 Wall. 182, came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that, on sound principle, the bond should be construed to extend the obligation of the depository beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is, to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that, prior to these decisions, there was any principle of public policy recognized by the courts, or imposed by the law, which made a depository of the public money liable for it when it had been lost or destroyed without any fault or negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safekeeping.'

"We believe the true rule is, that a public officer who receives money by virtue of his office is a bailee, and that the extent of his obligation is that imposed by law; that when unaffected by constitutional or legislative provisions, his duty and liability are measured by the law of bailment. If a more stringent obligation is desired, it must be prescribed ³¹² by statute; that his official bond does not extend to such obligations, but its office is to secure the faithful and prompt performance of his

legal duties. Instances where the constitution and statutes of the state have increased the common-law liability of certain officers were recognized by this court in two cases at least. In the case of *State v. Walsen*, 17 Colo. 170, it was held that, by the constitutional provisions, the state treasurer was made absolutely liable for state moneys received by him; and in the case of *McClure v. Commissioners*, 19 Colo. 122, it was held that a county treasurer, by virtue of the statute regulating the duties of his office, was a bailee with express and extraordinary liability. No constitutional or statutory provision in this state imposes a more stringent obligation upon a clerk of the district court than that imposed by the common law. This rule of common law, as laid down by Justice Story, is as follows: 'In respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence. If the property is lost or injured by any negligent or dishonest execution of the trust, they are liable in damages. . . . The degree of diligence which officers of the court are bound to exert in the custody of the property seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required ³¹³ of all persons who receive compensation for their services': *Story on Bailments*, sec. 620.

"It is insisted in argument that this doctrine refers only to specific property, and does not apply to money deposited with the clerk, because it is assumed that he holds the relation of debtor to the fund, and, therefore, may use it as his own. To this we cannot agree. The money received by him is a trust fund, and a conversion of it to his own use would constitute embezzlement, and subject him to criminal prosecution. The defendant, *Wilson*, as appears from the agreed facts, did not mix the money in question with his own funds, or in any manner treat it as his own. He deposited it in the bank, as clerk, and the bank had notice, thereby, that the money so deposited was held by him in his official capacity. At the time of the deposit, the bank was in good standing. We think, under the circumstances, he is not chargeable with any fault that should render him or his sureties liable for the loss. The judgment of the court below will be reversed, with directions to enter judgment for defendants."

This principle has been recognized and announced in *Tennessee*. In *Governor v. McEwen* (1842), 5 *Humph.* 241, it was declared that the liability of public officers is to be determined like that of private trustees, or, as *Reese, J.*, expressed it: "The meas-

ure of fiduciary responsibility, in the view of a court of chancery, will be the same, whether arising from ³¹⁴ public or private relations." In *Peck v. James* (1859), 3 Head, 76, the rule was reaffirmed. James, the trustee of Grainger county, moved against Peck, his predecessor in office, for a balance of school funds in his hands. Thereupon, Peck filed a bill to be exonerated, on the ground that the money had been paid to him in bills of the Bank of East Tennessee, but that the bank broke before he was required to pay out all the fund, and while a balance of \$680 in these notes remained in his hands. It was held that the trustee was entitled to be exonerated. "We think," said Caruthers, J., "the principle settled in the case of the *Governor v. McEwen*, 5 Humph. 241, must govern this." It is held in that case that "the measure of fiduciary responsibility, in the view of a court of chancery, will be the same, whether arising from public or private relations," and that, in the absence of bad faith, the same fair and equitable principles of adjustment which govern the subject of agency in general will be applied to and regulate the accountability of public agents.

There are other cases where the officer and his sureties were held liable, but upon other grounds, which do not exist in this case.

In *Hill v. Alston*, 12 Heisk. 569, the clerk and master of Shelby county was held liable for money lost by the failure of the bank in which it was deposited. It appeared that the money was deposited in his individual, and not in his official, name. The money so deposited was partly ³¹⁵ money he had received officially and partly his own private means. Interest was paid to him on these deposits. He was held liable on the ground that the money was deposited with his personal money to his individual credit under an agreement to receive interest thereon. The inference is undeniable that, if the facts had been otherwise, the clerk would not have been held liable.

In *Comfort v. Patterson*, 2 Lea, 670, the question was whether a clerk and master could set off a claim on account of a deposit made in a broken bank against a note the bank held against him. The facts were that the deposit was to the credit of "M. L. Patterson, C and M." It really consisted of: 1. His individual means; 2. Costs to which he was entitled; and 3. Funds received officially. A few days before the bank failed, he deposited \$1,500 of his individual means to the credit of this account. The note against which he pleaded the setoff was only for \$1,000. It was held that this plea of setoff was good. It was held that

the clerk's "individual" share of the fund exceeded his indebtedness, and could be set off against it. The question was reserved whether he could set off the balance of the fund against an individual claim. It was said, by way of dictum, that funds of various cases deposited in one general deposit, in the officer's name as clerk and master, "without any designation of the case or party entitled," would be ³¹⁶ personal, and the words would be *descriptio personae*, "not altering the rights of either party."

We think that it is not in accord with the spirit of our decisions, whatever it may be elsewhere, nor with sound public policy, to hold a public officer liable for public funds as an insurer. His obligation is the same as that prescribed by the common law, which is, that he discharge his trust with diligence, prudence, caution, and good faith, such as prudent persons bestow upon their own important affairs. This is the rule laid down in *Mechem on Public Officers*, sec. 301; *Murfree on Official Bonds*, sec. 197; *United States v. Thomas*, 15 Wall. 342; *Cumberland v. Pennell*, 69 Me. 357; 31 Am. Rep. 284.

Under such rule, a private trustee is not liable for money lost by the failure of a bank, when the reputation of the bank is good, and the money is deposited in good faith, to the trustee's credit, separate and apart from his own: 1 *Perry on Trusts*, 443; *Deitz v. Mitchell*, 12 Heisk. 676. And the same rule applies to an administrator: *Willeford v. Watson*, 12 Heisk. 476; or an executor: *Pritchard on Wills*, 699.

It is difficult to see what just end or sound public policy can be subserved by adopting a different rule as to public officials. If a public officer is held to be an insurer against loss when he exercises the utmost diligence, caution, and good faith, it will result that no man of any financial standing or business prudence would accept a public trust ³¹⁷ which involves the handling of public money. There would be but little inducement to act honestly and in good faith, since neither would avail against an unforeseen and unavoidable casualty.

We are of opinion that, under our statutes and decisions, a public officer intrusted with public funds is not an insurer against loss, but is liable only if he acts without proper diligence, caution, prudence, and good faith. We think this is the sound rule, notwithstanding the weight of earlier authority holding the contrary doctrine, and all, or nearly all, based upon *United States v. Prescott*, 3 How. 578. We proceed, therefore, to examine whether Copeland, the trustee, did exercise the proper diligence, caution, prudence, and good faith necessary to absolve

him from liability for the loss in this case. He had in his hands \$5,000 of public money, which he deposited in Marr's Bank on the 9th of February, 1893. He could not, at the time, lawfully pay it out, and it was his duty to keep it. Before making the deposit in that bank, he consulted the judge of the county court of Overton county, and requested him to have the court designate a place to put the fund until he was called upon to pay it out, stating that he would put it anywhere the court would select. He advised with Mr. Windle, one of his bondsmen and a good business man and merchant, as to where it should be placed, and Windle suggested that the local bank of Livingston, in Overton county, could be easily robbed, and advised that it be kept in some Nashville bank. ³¹⁸ The trustees of the county for several years had, as a matter of safety, deposited the public funds under their control in Nashville and Sparta. He conferred with many persons, who advised that it be placed in some good bank. Marr's Bank stood high at the time. Defendant's bondsman, Windle, recommended it. He was advised by Judge Goodpasture, a former resident of Overton county, a man of experience and substance, to select Marr's Bank, with the statement that he had been depositing in it for twenty-six years. He was then residing at Nashville and depositing in it. It appears to have been the only bank in Nashville that did not close its doors in the panic of 1873. The reputation of the bank at Nashville, as well as elsewhere, was excellent. It had been in apparently successful operation for thirty years. Other bankers, lawyers, and business men of Nashville say that its reputation was above suspicion. The money was put to his credit as trustee, and was not mixed with any funds of his own. It remained until June 13, 1893, when Copeland attempted to draw it out. After persistent demands, \$2,000 was paid, and then the remaining \$3,000 was again persistently demanded. The whole of it was all the time subject to check on demand. The bank could not pay the \$3,000, and suspended and assigned on the next day, and proved to be totally insolvent, and only a pro rata of about six per cent, or \$180, has ever been received since its suspension.

³¹⁹ It is said, however, that the deposit was made with an understanding that Copeland was to receive six per cent interest on it, and interest was subsequently entered up on the account on the books of the bank, the amount being \$42.50, as of date March 31, 1893. Copeland denies positively that he ever received a cent of interest, directly or indirectly,

or that there was any agreement that he should receive any. It appears to have been the custom of the bank to enter upon the pass-book of the customer the fact that interest was to be allowed when such was the agreement, and no such entry was made upon the pass-book given to Mr. Copeland. There was, however, an entry made on the ledger of the bank, after the name of Copeland, trustee, "6 per cent." This is explained by Mr. Freeman, the book-keeper, with the statement that the "country accounts" of the bank were, as a rule, interest bearing, and he so entered it without any instructions to do so. Marr gives the same explanation. All the witnesses, Marr, Freeman, Copeland, and Goodpasture, state that no interest was to be paid, Marr's statement being somewhat indefinite and negative in character.

It appears that, previous to this, Copeland had some funds in the local bank of Livingston, which offered to pay interest on the deposit, which Copeland refused, but he did accept a gratuity—as he says, a present—in consideration of his deposit, and a credit of two per cent was entered on his account on ³²⁰ several occasions. The statement of the president and cashier of the bank at Livingston are given, and from these we get the only intimation of fact which tends to show any want of good faith and unselfish action on the part of Copeland, outside of the book entry to which we have already referred. It appears that the defendant, Copeland, had seventeen hundred dollars on deposit in this bank, and drew it out only a day or two before making the deposit in Marr's Bank. He had kept his money in this bank for a year or two, and had been paid interest, or a gratuity, as before stated. It is argued from this, and the entry upon the ledger at Marr's Bank, that Copeland was to have interest from the latter bank at the higher rate of six per cent instead of two, as paid by the Livingston bank. Mr. Estes, the cashier of the Livingston bank, states that, a short time before the failure of Marr's Bank, he met with Copeland in Nashville. At that time there was a financial panic all over the country, which had affected the country banks as well as the city banks of Nashville. The Capital City Bank of Nashville closed, and on the next morning witness had a conversation with Copeland, in which the distressed condition of all the banks was commented upon, and in that conversation Copeland stated that he had his money in Nashville and was a little uneasy about it. Witness said to him if he would take his deposit back to the Livingston bank he could check on it at any time, and he and Miller, the president,

would go security ³²¹ for the bank and allow four per cent interest on the deposit. Copeland replied: "Can't you beat that?" and witness responded that he could not, and would not, and Copeland thereupon replied: "I can beat that here in Nashville." He then adds, but in a very indefinite way, that he intimated to Copeland that Marr's Bank was unsound, and Copeland then referred to the Fourth National of Nashville, and left witness under the impression it was in the Fourth. A few days thereafter Copeland was in Livingston, and stated to witness that he had seen Miller, the president, and he had agreed to the proposition witness had previously made. On this occasion witness states that he again referred to the unsoundness of Marr's Bank. He proves that he and Miller at that time were worth \$20,000 of property, free from encumbrance and subject to execution. On cross-examination, he states that Copeland did not say in the Nashville conversation that he could do better because he could get a higher rate of interest. He was also examined as to the condition of the Livingston bank, and stated that it had a capital of \$20,000; that it owed depositors, at the date Marr's Bank failed, \$37,307.04, and had cash, \$4,527, and loan notes, \$28,700; that it had tied up in the Commercial National Bank, which had then failed, \$20,080.80; that after the failure of the Commercial National Bank, the Livingston bank borrowed all the money it could get, and paid ten to twelve per cent for it from some parties, and lower rates to others, the cashier and ³²² president going the bank's security. Miller corroborates Estes in many particulars. He states, in addition, that he offered Copeland interest on his deposit, which Copeland declined, but said he would accept a gratuity; that they borrowed all the money they could get to tide their bank over the financial troubles.

Copeland, being recalled, states that in the conversation at Nashville no mention whatever was made of Marr's Bank, and only upon one other occasion, when Mr. Estes, referring to one of Marr's circulars, said that his bank would break some day. He corroborates Estes and Miller about the proposition to return the funds to Livingston bank, and that Miller and Estes would be securities and allow four per cent interest, to which he replied, he could beat that—meaning that he could beat it by keeping the money safe, for he had examined into the condition of the Livingston bank, after the failure of the Commercial, and did not consider it safe, and knew that it was borrowing all the money it could get. He consulted with attorneys and others,

and was advised not to return his money to the Livingston bank, and in this he is corroborated by several witnesses. This is the substance of all the testimony as to the condition of the bank, and the caution and care exercised by defendant, Copeland, in regard to it.

It is said that defendant had no right to deposit in any bank; that by so doing he simply parted with the money and made the bank his debtor; that ³²³ he could not loan the money directly to a bank or an individual, and that a deposit is virtually a loan; and that it should have been kept as a special deposit in some vault or safe. This argument, we think, is quite plausible, but is more specious than sound. If the money had been deposited in a vault of a bank or in a safe, and lost, under the authorities cited and relied on by plaintiff, the defendant would still have been liable, even though it had been placed in a safe furnished for that purpose by the county or state authorities: *Jefferson County Commrs. v. Lineberger*, 3 Mont. 231; 35 Am. Rep. 462; 22 L. R. Ann. 451, note.

The question resolves itself into a business proposition, whether it is more prudent to deposit the money in bank or place it as a special deposit in some vault or safe. The consensus of public opinion, and the almost universal trend of business transactions, is in favor of the former proposition, bearing in mind that the funds must be kept separate and apart, and must be put to the proper credit, and be subject to immediate check, and placed in a bank whose reputation is above question, and the deposit made in good faith, and not because of personal benefits or advantages which may accrue to the officer. Our act making it a felony to receive interest upon money deposited in bank by a public officer impliedly concedes that it may be deposited in bank. The liability of banks for special deposits is quite limited. If the deposit is for hire, then ³²⁴ ordinary care only is required; if no hire or compensation is paid, only slight care is required, and the bank is only liable for gross negligence: 2 Am. & Eng. Ency. of Law, 95, 96, and notes. The law allows an officer no compensation to be used in the hiring of a special deposit.

We do not consider a public officer a special bailee in the sense that he must keep the identical funds which he collects, and pay them out. If this be held, it must necessarily result in much embarrassment and confusion. In the first place, it would necessarily follow that the collector must receive only gold, silver, or such money as is a legal tender, for he could only require

those who have demands against the fund to receive such legal tender. Again, he must handle this fund every time it becomes necessary to make a payment out of it, and thus expose it upon every occasion when it is necessary to handle it. It would also follow that he must have it in such shape, denominations, and amounts as would enable him to make the exact change necessary to pay each claimant, otherwise he would be compelled to mingle other funds with it, and thus destroy its integrity as the original money received. It would prevent the giving of checks, which are so necessary to the prompt and proper dispatch of business and keeping of accounts in every-day transactions.

The learned chancellor was of opinion that due caution and diligence was not used by defendant. ³²⁵ He says: "In this case, the defendant made no personal examination, nor did he have any examination made, as to the solvency of Marr's Bank, nor had the bank officials made any publication for a long while of its condition, as required by its charter. He took the opinion of his friends, whom he confided in, but the opinions given were not based upon an examination or actual knowledge as to the solvency of the bank."

Nothing can be predicated to the prejudice of the defendant that he did not make, or cause to be made, a personal examination of the bank. Such an examination, except, perhaps, by an expert, would have resulted in nothing reliable. Nor would any bank of standing submit to a personal examination by its customers. The standing of a bank can alone be determined by outsiders by its mode of doing business, and its reputation in business circles. The fact that it did not make the stated publications required by law is a circumstance to be considered, with all others bearing upon the question of due caution in its selection, and must be considered in connection with the fact that, although the law stood upon the statute books, it had not been observed by state banks. The want of such publication is a failure to comply with the law, but, under the circumstances, not an indication of unsafe condition.

The conclusions to which we come, upon an examination of the entire record, are:

1. That the defendant was not an insurer of the ³²⁶ safety of the public funds in his hands, but responsible only for the exercise of the good faith, diligence, prudence, and caution, and a disinterested effort to keep and preserve the fund for those entitled.

2. That it was neither negligence nor want of proper business

prudence and caution to deposit the funds in a bank of undoubted standing and reputation, and Marr's Bank, at the time of the deposit had such standing and reputation.

3. The defendant, Copeland, cannot be considered as a debtor for the funds in his hands, but, on the contrary, had no right to use them in any way except for the purposes of his trust, and he held them, not strictly as a special bailee, but as a trustee, clothed with legal duties and liabilities.

4. The measure of the trustee's liability is fixed by the laws relating to his office, and not merely by the terms of his bond, and there is no unconditional obligation to pay under any and every contingency. The primary object and purpose of this bond is not to fix or define the limit of his liability, but to super-add to his personal responsibility the security of his bondsmen, and the liability of both principal and sureties under the bond is fixed by the laws relating thereto.

5. The weight of the evidence is, that there was no agreement that interest should be paid upon the deposit by Marr, and defendant, Copeland, was not ³²⁷ influenced by this consideration to make the deposit in that bank.

6. The defendant, Copeland, was justified in not returning the funds to the Livingston bank when the president and cashier of that bank suggested that it be done. The proposition made by the president and cashier to induce its return was an illegal one, so far as interest promised was concerned, and was calculated to arouse suspicion as to the condition of the bank. Nor would it have been an act of prudence, under the facts in this record, to return the fund to that bank in its condition at that time, even though it was secured by the personal indorsement of the president and cashier. The liability of the bank, as well as these officers, was at that time too great to warrant the trustee in putting his funds into their hands, even on the security offered.

7. The decree of the chancellor in holding the defendant, Copeland, and his sureties liable for the funds deposited in the Nashville Savings Company, and which were lost by its failure, is erroneous under the facts in this record, and must be reversed and the bill must be dismissed.

OFFICERS—LIABILITY FOR SAFEKEEPING OF PUBLIC FUNDS.—A public officer receiving money by virtue of his office is a bailee. The extent of his liability is that imposed by law. When unaffected by constitutional or legislative provisions, his duty and liability are measured by the law of bailment: *Wilson v. People*, 19 Colo. 199; 41 Am. St. Rep. 243, and note.

PIONEER SAVINGS AND LOAN COMPANY v. CANNON.

[96 TENNESSEE, 599.]

CORPORATIONS — FOREIGN — RIGHT TO PURCHASE LANDS.—If a foreign corporation has made a loan and taken a trust deed as security therefor, prior to the passage of a statute requiring it to file its charter with the secretary of state, and an abstract thereof in the county where land, which it seeks to purchase or acquire is situated, its right to foreclose its trust deed and become the purchaser of the land at a trustee's sale is not affected by such statute.

STATUTES—EFFECT OF, ON DEBTS.—If a valid debt is created prior to the enactment of a statute, the collection of the debt cannot be brought within the prohibition of such statute.

USURY—FOREIGN CONTRACT.—If a note and mortgage of lands situated in one state are made and executed in another state, usury cannot be set up as a defense to an action thereon in the former state, provided the interest contracted to be paid is legal under the laws of the state where the contract was made.

BUILDING AND LOAN ASSOCIATIONS—APPLICATION OF LAPSED STOCK PAYMENTS.—A stockholder in a building and loan association is not entitled to apply lapsed stock payments as a credit upon his loan from the association.

Malone & Malone and J. J. Du Bose, for the appellant.

F. Poston, for the appellee.

600 McALLISTER, J. This is an action of ejectment to recover the possession of a tract of land comprising about twelve acres, situated near Memphis. The complainant is a building and loan association incorporated under the laws of the state of Minnesota, with its office and principal place of business at Minneapolis, in said state.

The record discloses that on July 25, 1890, the defendant, H. E. Cannon, a citizen of Memphis, made application to complainant association to purchase twenty-six shares of its stock, of the par value of two thousand six hundred dollars. The stock was accordingly issued, subject to the rules and regulations of the company. It further appears that **601** on the 29th of July, 1890, the defendant, Cannon, made application to said company to borrow the sum of two thousand dollars. This application was forwarded to the home office of the company, at Minneapolis, and, after some delay, the application was granted. As evidence of this indebtedness Cannon and wife, September 1, 1890, executed their joint note to said company for the sum of two thousand dollars, payable seventy-six months after date. This note was dated and made payable at Minneapolis, and provided for the payment of five per cent interest per annum, and five per cent premium per annum, monthly, on or before the last

Saturday of each month, and stipulating, further, that "any failure to pay interest or premium, when due, shall, at the election of the payee, make the principal, interest, and premium at once due." A provision of ten per cent attorney's fee was also embraced in the note in the event default was made in the payment of the note.

For the purpose of securing the payment of this note at maturity, Cannon and wife executed a trust deed to one R. J. Black, conveying the twelve acres in question, and providing for the payment of the interest and premium evidenced by the note.

The trust deed further provided that "in case of any failure or default on the part of the parties of the first part to keep and perform any of the covenants or agreements herein contained, such failure or default shall, at the option of the holder of said ⁶⁰² note, have the effect of at once maturing the whole indebtedness secured hereby," etc.

Cannon continued to pay his interest and premium until November 1, 1892, when he made default, and thereupon the company, in pursuance of the terms of the note, declared the whole indebtedness due, and directed a foreclosure of the deed of trust. The trustee, R. J. Black, after due advertisement, on January 27, 1894, offered the property for sale at public vendue, when the complainant, the Pioneer Savings & Loan Company, became the purchaser at the price of twelve hundred dollars. Cannon and wife having refused to vacate the property, the present bill was filed to recover the possession. The chancellor adjudged that the sale of the land to complainant was valid and communicated a good title, ordered a writ of possession to issue, and pronounced a personal decree against defendant in the sum of eleven hundred and thirty-four dollars and ninety-eight cents, balance due on the note after crediting same by amount bid at sale. Cannon appealed, and has assigned errors.

The first assignment of error is, that complainant company is a nonresident corporation, and cannot maintain this action for the enforcement of property rights in this state, for the reason that at the time of these transactions it had not filed its charter with the secretary of state and an abstract thereof in Shelby county, as required by the act of 1891. It is a sufficient answer to this assignment of error to say that the original loan from the company to Cannon ⁶⁰³ was made September 1, 1890, and the trust deed to secure the loan was executed on the same day. This was prior to the passage of the act of 1891, and, of course, said contract is not affected by the provisions of the latter act.

It is true the foreclosure of the trust deed and the purchase of the property by complainant occurred subsequently to the passage of said act, but, the original transaction being valid, the mere collection of the debt is not within the prohibition of the statute.

The second assignment of error is, that the note and mortgage were both usurious on their faces and nonenforceable. As already stated, the note stipulates on its face to pay five per cent interest per annum and five per cent premium per annum at the office of the company at Minneapolis, Minnesota. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that state, which have been distinctly proved, and appear on the record.

The third assignment is that the court erred in not allowing defendant a credit of eleven hundred and eight dollars and six cents. It will be remembered that Cannon occupied toward this association a twofold relation—that of borrower and stockholder. The proof shows that Cannon, as debtor to the company, had paid on his loan note, in the way of interest and premium, the sum of four hundred and fifty dollars, and that, as stockholder, he had paid on his stock the sum of five hundred and ninety-six dollars and seventy cents.

In the decree pronounced by the chancellor, Cannon ⁶⁰⁴ was credited with interest and premium paid up to November 1, 1892, amounting to four hundred and fifty dollars, and charged with interest and premium accruing after that date. So that the only question under this assignment is, whether defendant is also entitled to a credit on his loan note of stock payments made by him, amounting to five hundred and ninety-six dollars and seventy cents.

The stock certificate issued by the company to Cannon provides that fines shall be imposed upon the shareholders upon default in payment of the dues, and if "such monthly, quarterly, and withdrawal installments, and all such interest, premium, and fines be not fully paid within ninety days after such first delinquency, this certificate shall wholly lapse, and this contract shall wholly cease, and become null and void as to any promise or obligation of the union, and all the payments made on this certificate shall thereupon be and become the absolute property of the union, and the union shall not be liable for any sum whatever under this certificate."

The certificate required the payment of monthly dues of sixty cents per share of stock held by the member, and each quarter a

payment on dues of twenty-five cents per share, and for every month in which there are no quarterly dues a withdrawal payment of twenty-five cents per share, all of these dues being payable on the last Saturday in each month. Section 2 of the certificate provides for fines for nonpayment of these dues. By section 6 the borrower is required to pay interest at five per cent ⁶⁰⁵ and a premium of five per cent per annum on the loan. By section 11 of the by-laws, it is provided that the whole debt shall mature upon default in payment of the premium and interest. By section 6 the borrower is required to pay attorneys' fees.

The record shows that after October, 1892, Cannon wholly defaulted in payments of any kind, and thereafter, on June 29, 1893, the company declared the stock certificate lapsed and all payments made thereon forfeited to the union. These forfeited payments made by Cannon on his shares were credited on the books of the corporation to the lapsed share account, and were thereafter distributed among other stockholders in good standing. The question arising upon these facts is, whether the stockholder in a building and loan association is entitled to apply stock payments as a credit upon a loan. In some jurisdictions, such a transaction has been viewed as an actual loan of money, and the aggregate amount of payments upon stock as partial payments on the loan by the borrower: *Overby v. Fayetteville etc. Assn.*, 81 N. C. 56; *Reynolds v. Pool*, 84 N. C. 38; 37 Am. Rep. 607.

The supreme court of Alabama, however, in the case of *Southern etc. Assn. v. Anniston Loan etc. Co.*, 101 Ala. 582; 46 Am. St. Rep. 138, says, viz: "It is a correct principle, as has been held, that there is no connection established between the stock held by the stockholders and the bond (or note) held by the company ⁶⁰⁶ such as that payments made on stock are to be treated as payments on the bond, so that one is steadily offset against the other, or the one merges in the other—a fallacy sometimes indulged, arising from a failure to observe the separate existence of the stock, on the one hand, and the bond on the other; the separate relation borne to the company, on the one side by its stockholders, and on the other by its borrower. The payment on the one is not necessarily a payment on the other": Citing *Washington etc. Assn. v. Hornbacker*, 42 N. J. L. 635; *Endlich on Building Associations*, sec. 452. After a review of the authorities, Mr. Endlich says: "It has, therefore, become a well-recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, ipso facto, work an

extinguishment of so much of the mortgage. The fact that the borrower has assigned his shares to the society as collateral security for his debt makes no difference, for this is a recognition of the distinct standing of the member as a member and as a debtor": *Endlich on Building Associations*, sec. 452. See, also, *Rogers v. Hargo*, 92 Tenn. 35.

The chancellor held that defendant, Cannon, was not entitled to an abatement of his indebtedness by a credit for stock payments, which ruling was in accord with the established doctrine on the subject.

Affirmed.

CORPORATIONS—FOREIGN—POWER TO PURCHASE LAND. A corporation created in another state can purchase, hold, and convey lands in New Hampshire: *Lumbard v. Aldrich*, 8 N. H. 31; 28 Am. Dec. 381; or in Michigan: *Thompson v. Waters*, 25 Mich. 214; 12 Am. Rep. 243, but the contrary rule prevails in Illinois: *Carroll v. East St. Louis*, 67 Ill. 568; 16 Am. Rep. 632; *United States Trust Co. v. Lee*, 73 Ill. 142; 24 Am. Rep. 236.

CONSTITUTIONAL LAW—RETROSPECTIVE STATUTE.—If a claim against the state does not bear interest when it accrues, a statute subsequently passed cannot impose a liability upon the state for interest thereon: *Molineux v. State*, 109 Cal. 378; 50 Am. St. Rep. 49. See, also, the notes to *Lane's Appeal*, 14 Am. St. Rep. 100; *Kennebec Purchase v. Laboree*, 11 Am. Dec. 98, and the extended note to *Goshen v. Stonington*, 10 Am. Dec. 131.

USURY—CONFLICT OF LAWS.—Where an obligation is made in one state but was to be performed in another, the parties are at liberty to regard it as a contract of either state and to stipulate for any rate of interest allowable in either: Extended note to *Bank v. Cook*, 46 Am. St. Rep. 201.

BUILDING AND LOAN ASSOCIATIONS—APPLICATION OF FORFEITED STOCK.—If a loan is made to a member of a building and loan association, for the payment of which he pledges his stock therein, and, by reason of his subsequent default in the payment of his dues, his stock becomes forfeited, he is not entitled to be credited on his loan with the value of his stock, nor with any payments made on account thereof: *Southern Building etc. Assn. v. Anniston Loan etc. Co.*, 101 Ala. 582; 46 Am. St. Rep. 138, and see the extended note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 162.

CHISM v. FIRST NATIONAL BANK.

[96 TENNESSEE, 641.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT TO FICTITIOUS PERSON—FORGERY.—The indorsement of a draft by the payee to the order of a fictitious person in good faith, believing him to be real, is not in law an indorsement to bearer, and the subsequent indorsement of the name of such fictitious indorsee by a third person without authority, is a forgery and does not protect the drawee bank in the payment of the draft to other than the payee named therein, and it is still liable to him for its value.

Turley & Wright, for the appellant.

Scruggs & Henderson, for the appellee.

⁶⁴¹ BEARD, J. The complainants are cotton factors in the city of Memphis. On July 13, 1894, they purchased from the First National Bank of Memphis a draft for three thousand dollars, payable to their order, and drawn on the defendant, the First National Bank of New York. After getting this draft, they indorsed it "pay to H. C. Hamilton or order," and then ⁶⁴² placed it in the hands of one Weems, to be delivered to the indorsee, Hamilton. The drawing, indorsement, and delivery of this draft were the result of a fraudulent scheme which Weems practiced upon complainants.

They were induced by him (at that time a man of fine reputation in the community) to think Hamilton was a real person, who had consigned to him as warehouseman, for storage and sale, a large lot of cotton, and this draft represented the advance which complainants agreed to make to the supposed consignor upon this cotton, upon an understanding that they were to sell same and earn the commissions accruing therefrom. It turned out, however, that Hamilton was nonexistent, and that Weems had no such cotton under his charge. But the record discloses that complainants neither knew, nor had occasion to suspect, such to be the facts, but, believing that Hamilton was a real personage, and with the view of carrying out this agreement with Weems, they purchased this draft and turned it over to him, indorsed, as is stated above, for delivery to their indorsee.

Immediately after its receipt, Weems indorsed it to himself or order, using for this purpose the name of Hamilton, and then carried it to the Mercantile Bank of Memphis, and that bank, without any suspicion of the bad faith of the transaction, or of the right of Weems to transfer title upon his indorsement, paid him full value for it, and then forwarded ⁶⁴³ it to its correspondent in New York, by whom, in due time, it was presented

to the drawee, who, equally ignorant of the want of title in Weems, and in perfect good faith, paid it. Discovering within a few days the fraud practiced upon them, and at the same time that the draft had already been paid, this bill was filed by complainants, the payee, against the drawee, the First National Bank of New York and the Mercantile Bank of Memphis; against the first upon an assumpsit implied from the wrongful appropriation of the draft and a refusal to account for its proceeds, and against the latter as a garnishee holding funds of the former subject to attachment. Two defenses are made: 1. That complainants were guilty of such carelessness in their dealings with Weems as to estop them from setting up the present claim; 2. That the indorsement by Chism, Churchill & Co. of this draft to a fictitious indorsee was in law an indorsement to bearer, and the result was, that its payment through the usual channels of trade, without notice of the alleged defect, discharged the drawee.

As to the first of these grounds, it is sufficient to say that the record fails to show any recklessness or carelessness upon the part of complainants in this transaction to prevent a recovery, if for any sound reason this suit is maintainable. It is the second ground, however, upon which the defendants rest largely their defense to this claim. What is the ⁶⁴⁴ effect of indorsing a bill to a fictitious person, the indorser not knowing that the indorsee was fictitious, but, on the other hand, believing him to be a real person, is a question of first impression in this state. There is no doubt it is true, as a general proposition, that the holder of commercial paper, payable to order, must trace his title through a genuine indorsement, including that of the payee: 2 Randolph on Commercial Paper, sec. 988; 1 Daniel on Negotiable Paper, sec. 519; Mead v. Young, 4 Term Rep. 28-30.

And it is equally true that where a banker pays a draft or check drawn upon him, he, at his peril, pays it to anyone but the payee, or to one who is able to trace his title back to the payee through genuine indorsements. The mere possession of the check or bill, under apparent title, does not necessarily imply the right to demand or receive payment, and, when it is paid to such holder, the drawer has put upon him the risk of seeing that the apparent is the real title to the paper. For the banker holds the funds of his depositor, under an obligation to pay them to him or to his order, and, if he pays them otherwise, he cannot treat such a payment as a discharge of his liability: Shipman v. Bank of New York, 126 N. Y. 318; 22 Am. St. Rep. 821; Robards v.

Tucker, 16 Q. B. 575; Dodge v. National Exchange Bank, 30 Ohio St. 1.

It is otherwise as to his payment of a check or bill payable to bearer. In such a case, in the absence of knowledge that the party presenting the paper is wrongfully in possession of it, he can safely ⁶⁴⁵ pay, because in so doing he is complying with the positive demand of his depositor: Tiedeman on Commercial Paper, sec. 312.

And it is insisted for the defense that this was the legal effect of the indorsement by Chism, Churchill & Co. to Hamilton, the fictitious indorsee.

It seems from a note to Byles on Bills, page 79, that the controversy over the effect of the indorsement of bills to fictitious persons grew out of the bankruptcy of Linsay & Co. and Gibson & Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. A great many cases grew out of these indorsements in the various courts of England, one of which was carried to the house of lords: Minut v. Gibson, 1 H. Black. 569. Mr. Chitty, in his work on Bills, page 178, says: "The result of the discussion seems to be that a bill payable to a fictitious person, or his order, is, in effect, a bill payable to bearer, and may be declared on as such, in favor of a bona fide holder ignorant of the fact, against all the parties knowing that the payee was a fictitious person." In other words, whether such a bill was collectible by the holder as if payable to bearer depended upon the fact that the party against whom it was sought to be enforced, at the time he assumed liability upon it, knew that the payee was fictitious. Where he possessed such knowledge, he was estopped from saying to a bona fide holder that he was not bound; otherwise, he ⁶⁴⁶ would be a party to the circulation of commercial paper, apparently good, yet with an inherent vice which rendered it worthless, at least as to him, though it fell into the hands of an innocent purchaser.

Subsequently, the bill of exchange act of 1882 was passed, the effect of which was, in part, that a bill might be treated as payable to bearer when the party named as payee was a real person, but has not, and was not intended by the drawer to have, any right arising out of it: Governor v. Vagliano, L. R. [1891] App. Cas. 107.

In this country, among the text-writers, Mr. Daniel states the rule as general, and says that "in the case of a note payable to a fictitious person, it appears to be well settled that any bona fide

holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such bona fide holder for the maker to set up that he did not know the payee to be fictitious." Mr. Daniel rests the rule upon the ground of estoppel, but Mr. Randolph, in his work on Commercial Paper, volume 1, section 164, note 4, suggests that the cases cited by him to support his text "apply this rule only when the maker has, by his words or conduct, raised any estoppel against himself," and this latter author fails in his text, as we understand it, to give the sanction of his approval to the rule as announced by Mr. Daniel.

⁶⁴⁷ The question presented in this case has arisen and been discussed in but few of the American courts, and the conclusions reached by them have been variant. *Blodgett v. Jackson*, 40 N. H. 21, relied upon by the defendants in this case, we think is not authority for the rule contended for by them. There a note payable to a firm of Whitney, Shaw, Lent & Hawes was in the possession of Lent, and was sold and transferred by him, for value, to the plaintiff in the action. The defendant, the maker of the note, denied the genuineness of the indorsement. To the issue made by this denial the court said: "The bare possession of this note by this person was competent evidence to be submitted to the jury that he [the party transferring] was the Lent named in the note, and, of course, a member of the firm, and authorized to indorse it in the manner he did. Here was a note which the evidence tends to show was genuine, payable to Whitney, Shaw, Lent & Hawes, a thing of value and likely to be in the possession of the owners; such possession, therefore, raised a presumption of ownership."

Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336, does raise the precise question here presented, and is a direct authority for the contention of defendants. In that case, it was held that the drawer of a bill who makes it payable to a fictitious person, and transmits to a third person for delivery to the payee, is bound to a bona fide purchaser from that third party, who indorses it with the name of the payee, ⁶⁴⁸ though the drawer, when he issued the bill, believed that the payee was a real person, and intended it to be delivered to him only upon the receipt of a valuable consideration from him.

The court rested its opinion on the text of Mr. Daniel, which has already been adverted to, and certain cases which were regarded as authorities, to sustain the rule adopted. *Lane v. Krekle*, 22 Iowa, 399, one of these cases, while it contains a dic-

tum which is in harmony with the conclusions reached by the court citing it, was confessedly not an authority on the real point in controversy, as in that case the note sued on was payable to bearer. Another of these cases is *Phillips v. Im Thurm*, 114 Eng. Com. L. 694; 18 Scott, N. S., 694. There the signature of the drawer, as well as the indorsement, was a forgery, but the acceptor was held liable upon the ground that he had misled the holder. The ground of the decision, as stated by Keating, J., in the final disposition of this case, reported in L. R. 1 Com. P. 463-472, was that "upon the facts stated in this special case, it was not competent for the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching, by his acceptance of it, the authenticity of the drawing." *Forbes v. Espy*, 21 Ohio St. 474, was also relied upon in *Kohn v. Watkins*, 26 Kan. 691; 40 Am. Rep. 336. In that case, E., W. & Co. issued a bill on New York to the order of C., H. & Co., its purchasers, who indorsed it to one Charles Clark, ⁶⁴⁹ whose real name, however, was Maro. This was a case of a fictitious payee, but of a man with an alias—or an assumed name—taking title in this assumed, rather than his real, name. So the court held that the indorsement and delivery of this bill to Clark must be regarded as an affirmation to all persons not otherwise informed, that there was such a person as Charles Clark, and that Mora was that person. We do not think, upon these facts, that this case can be said to support the general rule to which it was cited, and this was evidently the view of the supreme court of Ohio in a case to be referred to at length hereafter.

Upon the other hand, we have at least two well-considered cases, which, in effect, adopt the English rule, to wit, that only such paper as is issued to a fictitious payee or indorsee by the party sought to be bound, with full knowledge of the fact, shall be treated as payable to bearer.

In one of these cases—that of *Armstrong v. National Bank*, 46 Ohio St. 512, 15 Am. St. Rep. 655, after a careful review of the authorities, it is said: "If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when, in fact, there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the ⁶⁵⁰ same precautions in the one case as in the other—that is, determine whether the indorse-

ment is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement."

The case of *Shipman v. Bank of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821, involved over two hundred thousand dollars, was argued by counsel of research and ability, and was determined by a court of deserved reputation. In that case, it appeared that the plaintiffs were depositors in the defendant bank. They drew checks for large sums to fictitious payees, supposing them to be real persons. These checks were given to a trusted employé to be turned over to the respective payees. Instead, however, this employé indorsed the names of the payees upon them and had them presented to the drawee, when they were paid without inquiry or suspicion of the genuineness of the indorsements. Suit having been instituted by the drawer to recover the sum so paid out, it was resisted upon the ground that these checks were, in law, payable to bearer. The court, however, speaking through O'Brien, J., say: "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person."

We think the rule, thus limited, is reasonable, ⁶⁵¹ while to eliminate the element of knowledge or intent would leave it harsh and unreasonable. In addition with this limitation the law of negotiable paper, so far as it involves the question of forgery, is consistent. For it is universally conceded that the payment of a check or a bill drawn to the order of a real person upon a forged indorsement of the payee's name, will not protect. In such a case, the banker is still liable to the owner for the funds in hand as though no payment had been made: 3 Randolph on Commercial Paper, sec. 1739. And this would be so even if the forger should personate an intended payee of the same name: *Commonwealth v. Foster*, 114 Mass. 311; 19 Am. Rep. 353. Then, in a case where the drawer has been guilty of no wrong, but innocently issues or indorses his check or bill to a fictitious person believing him to be real, and a third party, without authority, writes the name of this fictitious payee or indorsee upon it, and by this fraud succeeds in collecting it, why should the drawee, by payment of such indorsement, discharge himself from liability to the drawer? The writing of the name of the nonexisting payee, under such conditions, is forgery at common law (4 Blackstone's Commentaries, 247; 2 Wharton's Criminal

Law, sec. 653), and under the code (Milliken and Ventrees' ed.), section 5492.

In the present case, without fault on the part of the complainants, the drawee has paid upon a forged indorsement, to a party not entitled to collect it, a bill of which Chism, Churchill & Co. were owners, ⁶⁵² and which no one had a right to collect save upon their order, and now has it and declines to account for its value. Under these circumstances, we think the chancellor was right in holding the drawee liable, and we therefore affirm his decree.

BANKS—FORGED INDORSEMENT OF CHECK—LIABILITY. A bank paying a check on a forged indorsement of the names of the payees is answerable to them for the amount thereof: *Jackson v. Bank*, 92 Tenn. 154; 36 Am. St. Rep. 81, and note. A bank is bound to know the signature of its depositors, and the payment of a forged check, however skillfully executed, cannot be debited against the depositor if he is wholly free from neglect or fault: *First Nat. Bank v. Allen*, 100 Ala. 476; 46 Am. St. Rep. 80, and note. See, also, the note to *First Nat. Bank v. Northwestern Nat. Bank*, 43 Am. St. Rep. 259, and the extended note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

STATE *v.* MORRILL.

[68 VERMONT, 60.]

LARCENY.—FOREIGN LAW IS PRESUMED to be the same as the domestic law as regards the crime of larceny.

LARCENY—STEALING IN ONE COUNTRY AND CARRYING INTO ANOTHER.—One who steals property in a foreign country and carries it into Vermont may be punished there as for a fresh larceny.

LARCENY—STEALING IN ONE STATE AND CARRYING INTO ANOTHER.—One who steals property in one state and carries it into a sister state may be punished in the latter as for a fresh larceny, and the same rule applies as to property stolen in a foreign country.

Cook & Redmond, for the appellant.

O. S. Annis, for the state.

⁶¹ ROWELL, J. Indictment for the larceny of a horse, a wagon, and a harness. The testimony on the part of the ⁶² state tended to show that the prisoner hired the team of the owner in Canada, to drive from a certain place therein to a certain other place therein and return the next day; that he did not return at all, but drove through and beyond his destination and into Orleans county in this state, where he tried to sell the team; and that when he thus obtained possession of it in Canada he intended to steal it. There was no proof as to the law of Canada, and the prisoner moved for a verdict of acquittal, for that there was no such proof, and for that he could not be convicted of larceny in this state if all was true that the testimony tended to show. The motion was overruled, and the prisoner excepted. Verdict of guilty. Although courts do not, without proof, take notice of foreign laws, yet they will assume that certain general principles, consonant to reason and natural justice and of universal appli-

cability, are recognized by all civilized nations; as, for instance, the right of self-preservation, the privileges and exemptions of necessity, the common duties of humanity, of more or less perfect obligation, and those obligations, for the most part conventional, upon which is based the modern system of international law. Thus, the right to immunity from personal restraint and personal violence is such a natural right and so generally recognized that he who sues for false imprisonment or assault and battery in another country need not in the first instance prove that the act complained of was unlawful where committed; it will be presumed to have been unlawful there, and to have imposed liability for damages; or, to speak more exactly, in the absence of such proof, the court will proceed according to the law of the forum: *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 129; *Carpenter v. Grand Trunk Ry. Co.*, 72 Me. 388; 39 Am. Rep. 340. Wharton says that with regard to what may be called processual presumption, of which the presumption that a foreign law is the same as the domestic is one, no doubt the *lex fori* decides: Wharton on Conflict of Laws, sec. 782. But whether ⁶³ you say that, in the absence of proof, the court will presume the foreign law to be like the domestic law, or say that the court will proceed according to the domestic law, makes no difference with the rule, for it is the same in effect either way. In *Langdon v. Young*, 33 Vt. 136, Redfield, C. J., says it is proper to assume that flagrant violations of the fundamental principles of moral obligations, such as theft and murder, are regarded as crimes by all Christian nations, and that unjustly to accuse abroad one of such deeds as there committed is actionable. In *Woodrow v. O'Conner*, 28 Vt. 776, this court assumed, in the absence of proof, that there was no difference between our law and the law of Canada in respect of the validity of arbitration notes.

So in the case at bar, the court might well assume, as it did, that there was no difference between our law and the law of Canada in respect of larceny in the circumstances disclosed, and proceed according to our law.

For a hundred years our courts have held the common law to be, that one who steals property in another country and brings it into this state is guilty of larceny here. The same is true of one who steals in another one of the United States and brings the property here. The first reported case in respect of stealing in Canada is *State v. Bartlett*, 11 Vt. 650, decided in 1839. It was there said that the rule had been too long settled, and

recognized by too long and uniform a course of practice and decision, to be changed except by legislative action. That was fifty-seven years ago. The rule has not been changed by legislative action, although the attention of the legislature was then specifically directed to the matter, and hence it is fair to infer that the legislature has been satisfied with the rule. If it was too late then for the court to change the rule, it is certainly too late now. Nor can it be changed except for reasons that would equally call for its abrogation in cases of property stolen in another state of the Union and ⁶⁴ brought here, for the states are as independent of one another in respect of their jurisdiction as they are of foreign countries. Two states, Massachusetts and Ohio, have attempted to distinguish between the thief who brings therein property stolen by him in another state, and the thief who does the like with property stolen by him in another country, convicting the one and acquitting the other: *Commonwealth v. Uprichard*, 3 Gray, 434; 63 Am. Dec. 762; *Stanley v. State*, 24 Ohio St. 166; 15 Am. Rep. 604. But we think no such distinction can be made, and that both cases stand on precisely the same ground. We could not, therefore, abrogate the rule as to one without abrogating it as to both, which we are by no means prepared to do. We are satisfied with the rule as matter of policy, as was the court in *State v. Bartlett*, 11 Vt. 650; for our law should not be such as to induce thieves to come here with their plunder. We are satisfied with it on principle, for every asportation is a fresh trespass and a fresh taking, and so, as matter of law, you have a felonious taking and carrying away in this state, since the possession, as well as the title of the property, is deemed to continue in the owner notwithstanding the original taking, as that was felonious. It is upon this precise ground that in England one who steals goods in one county and carries them into another may be indicted for larceny in the latter, though he can be indicted for robbery only in the county where the force or putting in fear was. It is true they do not extend the rule to cases where the property was stolen abroad; but the principle of the rule is logically capable of such extension, and, in effect, it receives such extension in this country when a thief is convicted of larceny in one state for bringing in goods that he stole in another state, which the states very generally do, though some do not. On this ground it is that one who steals my goods from one who had stolen them may be indicted as having stolen them from me. Ohio denies the principle altogether, and says that a ⁶⁵ mere change of place

by the thief while he continues in the uninterrupted and exclusive possession of the stolen property does not constitute a new taking, either in law or in fact, and yet she convicts of larceny the thief who brings goods into the state that he stole in another state, but upon what ground is not obvious.

Larceny of the same goods by the same person may be committed any number of times; and this offense, like every other, is punishable in the jurisdiction in which it is committed. We cannot punish for offenses against a foreign law, but only for offenses against our law. But a man cannot bar prosecution for a criminal act here on the ground that he committed a like act elsewhere. A man can neither be punished nor escape punishment here because he stole the same goods in another state or country: 1 Bishop's Criminal Law, 7th ed., sec. 137.

This question is so fully discussed in the cases, and the reason for the different holdings so fully stated, that further discussion here is unnecessary. We may say, however, that Maine holds with us on the question here involved: *State v. Underwood*, 49 Me. 181; 77 Am. Dec. 254.

Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions.

LARCENY—STEALING IN ONE COUNTRY AND CARRYING INTO ANOTHER.—Larceny committed in a foreign country is punishable in Maine, if the stolen goods are found in the defendant's possession in any county of the state: *State v. Underwood*, 49 Me. 181; 77 Am. Dec. 254, and note. The bringing into Ohio by the thief of goods stolen in the Dominion of Canada or any other foreign country, is not larceny in Ohio: *Stanley v. State*, 24 Ohio St. 166; 15 Am. Rep. 604.

LARCENY—STEALING IN ONE STATE AND CARRYING INTO ANOTHER.—A person may be prosecuted and punished in Texas for larceny committed by stealing property beyond its boundaries and bringing it into that state: *McKenzie v. State*, 32 Tex. Crim. Rep. 568; 40 Am. St. Rep. 795, and note. If goods are stolen in one state or country, and taken by the thief into another, the courts of the latter have not jurisdiction to try him for his offense, unless such jurisdiction has been expressly conferred by statute: *Strouther v. Commonwealth*, 92 Va. 789; 53 Am. St. Rep. 852.

LYNDONVILLE NATIONAL BANK v. FLETCHER.

[68 VERMONT, 81.]

NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENTS OF RENEWAL NOTES—NEGLIGENCE.—A bank cannot be charged with negligence in not comparing the forged signature of an indorser on a renewal note with the true signature of the indorser on the original note to it, unless, in so doing, it is guilty of actual bad faith.

NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENT OF RENEWAL NOTE—ESTOPPEL.—If a bank takes a renewal note with a forged indorsement, and gives up as paid the one with a genuine indorsement, the bank is not estopped, as against the indorser, from maintaining suit upon the original note by the fact that it stamped such note paid instead of renewed.

NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENT OF RENEWAL NOTE—ESTOPPEL.—If a bank takes a renewal note with a forged indorsement, and gives up as paid the one with a genuine indorsement, the bank is not estopped, as against the indorser, from maintaining suit on the genuine note by the rule that when one of two innocent parties must suffer from a mistake, the one making the mistake must bear the loss.

ESTOPPEL.—MISREPRESENTATION MADE THROUGH MISTAKE or induced by fraud does not create an estoppel.

IF NO FAULT OR NEGLIGENCE is imputable to either party, a loss must remain where the course of business has placed it, and no cause of action arises thereon.

W. P. Stafford, C. A. Prouty, H. Blodgett, and Bates & May, for the appellant.

Smith & Sloane and Dickerman & Young, for the appellee.

S3 ROWELL, J. The defendant was surety for Walter on a second renewal note to the plaintiff bank. Walter had put twenty thousand dollars of securities into the defendant's hands, in consideration of which he agreed to and did indorse for him to that amount, of which said note was a part. The bank knew that the defendant was surety, but did not know that he had security. Said note was taken up by a note that Walter sent to the bank, signed by him and purporting to be signed by the defendant, but on which he had forged the defendant's name. There were several like forged renewals, but the defendant had no knowledge of any of them till the bank notified him of the approaching maturity of the last one, and informed him that it would not be renewed; whereupon he went to the bank, saw the note, pronounced his name thereon a forgery, and refused to pay it, and thereupon, at its maturity, this suit was brought thereon and on the three genuine notes and another of the forged renewals.

When the last genuine note was thus taken up, the bank stamped it "Paid," and sent it to Walter, who carried it to the

defendant, who, when he saw it, was thereby induced to believe, and did believe, that it was paid and extinguished and he released therefrom, and thereupon, relying on that belief, he signed another note for Walter for the same amount, which otherwise he would not have done, and whereby he was damnified.

⁸⁴ The defendant never had anything to do with the bank concerning any of the notes except as aforesaid, but the business was all done by Walter.

The defendant conceded that the bank believed the forged renewals were genuine, and acted upon that belief in taking them, and otherwise would not have taken them; but he claimed that the cashier was negligent in taking the first forged renewal and stamping and giving up as paid the last genuine renewal, for that the forgery was so manifest that, as a careful and prudent man, with both notes before him, he ought to have detected it; and he asked to go to the jury on that question, claiming that if the negligence was found, the plaintiff would be thereby estopped from recovery on the last genuine note.

The defendant also claimed that by stamping said last-mentioned note "Paid" instead of "Renewed," as the fact was, the bank made a false statement, to its knowledge, and that when it sent the note to Walter thus stamped, it ought to have known that he would show it to the defendant, and that the defendant would be thereby induced to believe it was paid and extinguished, and to act accordingly, to his prejudice, or, at least, that it ought to have known that such would naturally and probably be the fact, and that if the jury should find that the bank, in the exercise of the requisite care and prudence, ought to have so known, then what it did in this behalf amounted to a representation by it to the defendant that the note was in fact paid and extinguished; and if it was further found that the defendant acted upon that representation to his prejudice, the plaintiff would be estopped from recovery on that note.

The defendant further claimed that if the parties are to be regarded as equally innocent in the matter, and the taking of the first forged renewal and the stamping and giving up as paid of the genuine renewal were a mere mistake on ⁸⁵ the part of the bank, then the loss must still rest upon the plaintiff, which made the mistake, and on which the chances of business have placed it.

But the court ruled against the defendant on all his claims, and directed a verdict for the plaintiff for the amount of the

last genuine renewal, to which the defendant excepted; and he now makes substantially the same claim that he made below.

It was undoubtedly the duty of the bank to act in good faith toward the defendant in the matter, but it was under no further duty to him: *Bank of Newbury v. Richards*, 35 Vt. 281, 284. The presentation by Walter of the first forged renewal was a representation by him that it was genuine, and the bank, certainly with nothing to arouse its suspicion, owed the defendant no duty to distrust Walter and to examine the two notes to see whether his representation was true or not. No case is cited nor principle suggested requiring that. A bank is bound to know the signature of its depositor, and, therefore, if it pays a forged check purporting to be his, it must bear the loss. So the acceptor of a bill is bound to pay it although the drawer's name is forged, for the presentation of the bill is a direct appeal to him to accept or to reject it. It is an inquiry as to its genuineness, addressed to the one who, of all others, is supposed to be best able to answer it, and whose answer is most satisfactory. He is, moreover, the person to whom the bill itself points as the legitimate source of information to others, and, if he were permitted to dishonor the bill after he has once honored it, the very foundation of confidence in commercial paper would be shaken. But the drawee of a bill is not bound to know the signature of the payee, nor to examine and ascertain whether the indorsement is genuine; and if he pays on a forged indorsement, though to an innocent holder, he can recover the money: *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; 43 Am. Rep. 655; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 ⁸⁶ N. H. 442. Nor is a bona fide indorsee, whether before or after acceptance, bound to inquire into the genuineness of a bill, in order to retain the money received by him from the drawee in payment thereof: *Price v. Neale*, 3 Burr. 1354, a case that has never been departed from. So if a bank receives as genuine fraudulently altered bills of its own, and passes them to the credit of a depositor who acts in good faith, it is bound by the credit thus given, for it was its duty to know its own bills: *Bank of United States v. Bank of Georgia*, 10 Wheat. 333.

But the case at bar is unlike the case of a drawee who pays or accepts a forged bill, or of a bank that receives as genuine forged notes purported to be its own, for here the bank was not bound to know the defendant's handwriting, and it was not its duty to examine with reference to ascertaining a thing that it was not bound to know. But by this we do not mean to say that

it could shut its eyes that it might not see, or turn away lest otherwise facts might be disclosed at variance with what it represented to exist, for that would be bad faith and a breach of its duty. It follows, therefore, that as here was no duty to examine, there was no negligence in not examining.

Nor was the representation of payment that the bank made false to its knowledge, as claimed, but true in its belief, in substance and effect, for, had the forged note been genuine, it would, in law, have paid the other note and extinguished it as affording a cause of action against the defendant; and as knowledge of the falsity of the representation is not imputable to the bank, as it was not in a position that it ought to have known, there can be no estoppel on this score.

The case comes to this, then, that said representation was a mistake on the part of the bank, arising from its nonculpable ignorance of the truth, and brought about by the fraud of Walter; and it would seem that a representation ⁸⁷ induced by fraud will not estop: *Bigelow on Estoppel*, 3d ed., 491.

But it is claimed that, if a mistake, the case is one that calls for the application of the rule that when a mistake has been made from which one of two innocent parties must suffer, he must suffer who made the mistake, especially when, as here, the chances of business have placed the loss upon him; and *Gloucester Bank v. Salem Bank*, 17 Mass. 33, is cited in support of this proposition. That was a case in which the plaintiff had paid to the defendant notes on which the name of its president had been forged, but which were otherwise genuine, and had neglected for fifteen days to return them; and the court stated the question to be, whether, as between the parties who were equally innocent and ignorant, the loss should remain on the plaintiff, where the chances of business had placed it, or be shifted back upon the defendant, which had, by good fortune, rid itself of it. It then went on to say that in all such cases the just and sound principle of decision had been, that if the loss could be traced to the fault or neglect of either party, it should be fixed on him; but that generally when no fault nor negligence was imputable to either party, the loss had been suffered to remain where the course of business had placed it. But the first part of that principle is not applicable here, for the loss is not traceable to the fault nor the neglect of the plaintiff. Nor is the second part any more applicable, for it can hardly be said that the chances of business have placed the loss on the plaintiff, but rather on the defendant; but, if it can, the plaintiff, in legal effect, holds the

defendant's note, and it has not been paid, and the plaintiff is not estopped from collecting it of him. In these circumstances the chances of business can avail the defendant nothing.

Judgment affirmed.

Taft, J., being engaged in county court, did not sit.

NEGOTIABLE INSTRUMENTS — RENEWAL NOTE — FORGED SIGNATURE.—The receipt of a new promissory note, a signature to which is afterward found to be forged, does not operate as a payment of the original note, or extinguish the right of action thereon: *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281; *Allen v. Sharpe*, 37 Ind. 67; 10 Am. Rep. 80.

ESTOPPEL IN PAIS, CREATION OF.—To create an estoppel in pais, there must be some conduct of the party against whom the estoppel is alleged amounting to a representation or concealment of material facts, and when everything is equally known to both parties, although they are mistaken as to their legal rights, no estoppel arises: *Estis v. Jackson*, 111 N. C. 145; 32 Am. St. Rep. 784, and note with the cases collected.

EQUITY.—WHEN ONE OF TWO INNOCENT PERSONS MUST SUFFER, he whose neglect has caused the loss must bear it: *Ridgway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 586; *Caldwell v. Neil*, 21 La. Ann. 342; 99 Am. Dec. 738. and note; *Beach v. Schoff*, 28 Pa. St. 195; 70 Am. Dec. 122; *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578.

STATE v. EMERY.

[68 VERMONT, 109.]

LARCENY—THEFT OF SEVERAL ARTICLES—ONE PROSECUTION AS BAR.—The theft of several articles at one and the same time and place constitutes but one indivisible crime, even though the articles belong to different owners, and a conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others.

CRIMINAL LAW—PROSECUTION AS BAR.—A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.

LARCENY—DIFFERENT CRIMES ON ONE EXPEDITION.—The theft of several articles at different and distinct times and places on the same expedition, from the same or different owners, creates distinct and separate larcenies.

LARCENY—AGREEMENT NOT TO PROSECUTE.—An agreement between the prosecution and one charged with several larcenies, that if he pleads guilty to one charge he shall not be prosecuted upon those remaining, may be enforced by the court.

Indictment and conviction of the defendants in September, 1895, for the larceny of certain clothing. In April, 1895, an information was filed charging them with the larceny of clothing from several different persons, but not including the one named in the indictment under which the present conviction was had. In April, 1895, the defendants pleaded guilty to the information

then on file against them, and were sentenced to a term in the house of correction. They claimed on the trial of the later indictment that such plea was entered upon an agreement with the prosecuting attorney that no further prosecution for such larcenies should be had, and offered to prove such an agreement. Their offer was rejected by the court, and they excepted and appealed.

C. G. Austin, for the appellants.

I. N. Chase, state's attorney, for the state.

¹¹¹ TYLER, J. It is an elementary rule in criminal law, that the theft of several articles at one and the same time and place, and by one and the same act, constitutes but one indivisible crime, even though the articles belong to different owners, and that a judgment of conviction or acquittal of the theft of one of the articles is a bar to a prosecution for ¹¹² the theft of the others. A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.

It is equally well settled that if, on the same expedition, there are several distinct larcenous takings, as taking the goods of one person at one place, and afterward taking the goods of another person at another place, and so on, as many crimes are committed as there are several and distinct takings. None of the cases cited on the respondents' brief go beyond this rule.

The case does not even show that the larceny charged in the indictment was committed on the same expedition as the crime for which the respondents had previously been convicted and sentenced, though the court below seems to have given the respondents full opportunity to show it.

If that court had found that an agreement was made at a former term between the state's attorney and the respondent's counsel, that if the respondents would plead guilty to one offense of larceny, they would not be further prosecuted, it might have enforced the agreement. There is no question for revision here.

Judgment that the respondents take nothing by their exceptions; judgment on verdict.

LARCENY—THEFT OF SEVERAL ARTICLES.—The larceny of articles belonging to different owners, if at the same time and place, constitutes but one offense: *Lorton v. State*, 7 Mo. 55; 37 Am. Dec. 179, and note; *State v. Hennessey*, 23 Ohio St. 329; 13 Am. Rep. 253; *Wilson v. State*, 45 Tex. 76; 23 Am. Rep. 602.

CRIMINAL LAW—FORMER JEOPARDY.—Where the offense on trial is a necessary element in, and constitutes an essential part of, an-

other offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note. Under indictments charging the prisoner with robbing three different persons upon the same stage at the same time, an acquittal or conviction under one indictment is not a bar to a prosecution under the others, as the different robberies are distinct offenses: *In re Allison*, 13 Colo. 525; 16 Am. St. Rep. 224. See, especially, the note to *People v. Bentley*, 11 Am. St. Rep. 228.

WELLS v. ATKINS.

[68 VERMONT, 191.]

JUDGMENTS AGAINST INSOLVENTS—COLLATERAL ATTACK.—A judgment rendered against an insolvent during the pendency of insolvency proceedings by a court of competent jurisdiction cannot be collaterally attacked on the ground that it was rendered in violation of a statute providing that an action pending against a debtor at the time of commencement of insolvency proceedings by him shall, on his application, be stayed to await the determination of insolvency proceedings on the question of his discharge, unless he unreasonably delays endeavoring to obtain a discharge.

G. W. Wing, for the appellant.

J. P. Lamson, for the appellee.

¹⁹¹ **START, J.** The plaintiff's intestate brought an action against the defendant, returnable to the September term, 1886, of the Washington county court. On the twenty-fifth day of September, 1886, the defendant filed his petition in the court of insolvency, and was adjudged an insolvent debtor. On the first day of December, 1886, he filed a motion for stay of proceedings in the action then pending in favor of the plaintiff's intestate, and all proceedings were stayed until the March term, 1888, when judgment was rendered for the plaintiff. The insolvency proceedings were then pending, and the defendant subsequently, on the fifth day of December, ¹⁹² 1889, obtained his discharge. This action is brought to recover the amount of said judgment.

The defendant's counsel insists that the court rendering the judgment now declared upon did not have such jurisdiction of the parties as authorized the rendering of the judgment, and cites Vermont Statutes, section 207, in support of this claim. This section provides that no creditor whose debt is provable shall, unless the amount due such creditor is in dispute, be allowed, after the filing of the petition, to prosecute to final judgment, a suit at law or in equity therefor against the insolvent debtor until the question of such debtor's discharge has been determined; and any such suit shall, on the application of the

debtor, unless he unreasonably delays endeavoring to obtain a discharge, be stayed to await the determination of the court of insolvency on the question of discharge. If the amount due the creditor is in dispute, the suit, by leave of the court of insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency; but execution shall be stayed.

At the time the defendant filed his petition in the court of insolvency, the suit was pending. The parties were regularly before the court, and the court had jurisdiction of the subject matter of the suit and of the parties; and it was not deprived of this jurisdiction by the insolvency proceedings. The statute places no barrier upon the jurisdiction of the court in which the suit is pending. It only provides for a stay of proceedings until the question of the debtor's discharge has been determined in the court of insolvency, and the duration of the stay is dependent upon the diligence of the debtor in procuring his discharge, or having the question of his right thereto determined by the court of insolvency; and the court in which an action is pending may, at any time, adjudge that there has been an unreasonable delay in bringing the question of the debtor's discharge to a ¹⁹³ final hearing, or it may find and adjudge that the question has been decided by the court of insolvency and a discharge denied, or it may find that a discharge has been granted and adjudge that it is not a bar to the action. The court in which the action is pending retains jurisdiction to thus adjudge, and to render a valid and binding judgment; and such a judgment cannot be impeached collaterally. It can only be impeached, as between the parties thereto, by some proper proceeding bearing upon the judgment itself: *Porter v. Gile*, 47 Vt. 620; *Lackey v. Steere*, 121 Ill. 598; 2 Am. St. Rep. 135; *Bowen v. Eichel*, 91 Ind. 22; 46 Am. Rep. 574.

If a right guaranteed to the defendant under the statute was denied him by the court rendering the judgment, his remedy was by exceptions to the supreme court. He cannot avoid the judgment because of a mere error or irregularity of the court by which it was pronounced. The court had jurisdiction to render the judgment, and whatever has been thereby decided and determined must be regarded as conclusively and irrevocably established, as between the parties, until the judgment shall be set aside.

Judgment affirmed.

JUDGMENT AGAINST INSOLVENTS.—A judgment against a bankrupt pleading proceedings in bankruptcy based on a debt existing before his petition is filed is not a nullity. A discharge in bankruptcy does not release or affect any person liable for the same debt with the bankrupt either as partner, joint contractor, surety, or otherwise: *Lackey v. Steere*, 121 Ill. 598; 2 Am. St. Rep. 135, and note. A discharge in bankruptcy does not affect a judgment of a state court against the bankrupt, obtained after an adjudication of bankruptcy, in an action pending at the time of the adjudication and not stayed: *Bowen v. Eichel*, 91 Ind. 22; 46 Am. Rep. 574, and extended note. A judgment obtained pending proceedings in bankruptcy upon a debt provable therein is barred by the subsequent discharge of the judgment debtor in such bankruptcy proceedings: *Locheimer v. Stewart*, 91 Tenn. 385; 30 Am. St. Rep. 887, and note. See, also, the note to *Morrill v. Morrill*, 23 Am. St. Rep. 112, and *Clark v. Rowling*, 53 Am. Dec. 296.

RAYCROFT v. TAYNTOR.

[68 VERMONT, 219.]

MALICIOUS EXERCISE OF A LEGAL RIGHT gives no cause of action, though resulting in injury to another.

EMPLOYER AND EMPLOYEE—CAUSING DISCHARGE OF THE LATTER.—If one in the exercise of a lawful right threatens to terminate a contract between himself and another unless the latter discharges his employé, not engaged for any definite time, the discharged employé has no right of action for damages against the party making the threat, although his motive in procuring the discharge may have been inspired by malice.

J. P. Lamson, for the appellant.

J. W. Gordon and R. A. Hoar, for the appellee.

220 ROSS, C. J. At the close of the testimony, the defendant requested the court to direct the jury to return a verdict in his favor, and excepted to its failure to comply with this request. He also excepted to that portion of the charge of the court set out in the exceptions. These exceptions raise the same question. He contends that the defendant's relation to the business and property of C. E. Tayntor was such that no liability arose from his acts, of which the plaintiff complains. C. E. Tayntor owned and operated a granite quarry, in the fall of 1891, and therein employed from sixty to ninety workmen. He resided in New York and spent very little time at the quarry.

The defendant was the manager and superintendent of his business, employed and discharged the help, paid them, purchased supplies and anything needed in the business. A man by the name of Libersont obtained from the defendant leave to go upon the quarry and cut some of the poor granite into paving stone on paying an agreed price therefor. This contract was for

no definite period and was terminable at the pleasure of the defendant. Libersont had the right to leave the work at pleasure. He expected, if no difficulty ²²¹ arose, to continue the work through the winter. The plaintiff came to work for Libersont by the hour, with an understanding, if they got along well together, that he could work through the winter. Either party could end this arrangement at his pleasure.

While the arrangement was existing between the plaintiff and Libersont, the plaintiff purchased the standing trees on a piece of land adjoining the quarry on which was a small spring. C. E. Tayntor, to obtain the spring for the use of the quarry, through the defendant purchased the land on which it was located and on which the trees which the plaintiff had purchased stood. The plaintiff had cut some of the trees. The defendant, acting for C. E. Tayntor, purchased from the plaintiff what trees there were then standing on this piece of land about the spring. When the defendant was paying the plaintiff for the trees, a difficulty arose over the terms of a receipt which the defendant asked the plaintiff to sign. As the plaintiff's testimony tended to show, the defendant became very angry, ordered the plaintiff to leave the premises, and added that he would go to Libersont and get him discharged; that he did go to Libersont and tell him, that if he did not discharge the plaintiff, he could no longer cut paving blocks on the premises. Libersont informed the defendant of his arrangement with the plaintiff, that the plaintiff was satisfactory to him, and that he did not want to discharge him. The defendant insisted that he must discharge the plaintiff or leave the works. Libersont thereupon, and because the defendant demanded he should do so or leave, discharged the plaintiff.

The evidence tended to show that the plaintiff was not able that winter to procure another place where he could obtain as good wages as Libersont was paying him. The court in substance charged, that, notwithstanding the defendant, as superintendent and manager for C. E. Tayntor, had the right to terminate the contract with Libersont, at ²²² pleasure, and without having any reason for so doing, and Libersont had the right to dismiss the plaintiff at his pleasure, yet if his dismissal was brought about by the defendant's threat to terminate Libersont's right to remain on the quarry and cut paving stone, and this action of the defendant was malicious and occasioned damage to the plaintiff, the action could be maintained. The court did not define to the jury what constitutes legal or actionable malice. It is evident

that if the defendant, in the capacity which he sustained to the quarry, actuated by hatred and ill-will, or for any other cause, had terminated the contract with Libersont and compelled him to leave the quarry, Libersont could have maintained no action therefor, although it was shown to be to his pecuniary detriment. By so doing the defendant would be exercising a legal right, resting in him as superintendent and manager of the business.

When one exercises a legal right only, the motive which actuates him is immaterial. If the defendant had exercised this right, and Libersont had left the quarry, the plaintiff would have had to leave working on the quarry also. He had acquired his right to work on the quarry under the right which the defendant, as superintendent and manager, had conferred on Libersont; hence, the plaintiff's right to remain and work there for Libersont, being derived from the right which the defendant in his capacity of superintendent and manager had conferred upon Libersont, was not superior to the right of Libersont. If the defendant had done what he threatened to do, discharged Libersont for the express purpose of removing the plaintiff from the quarry, and if he would have incurred no liability, whatever may have been his motive for the act, it is difficult to discover how his threat to do this act, if Libersont did not discharge the plaintiff, can give a right of action to the plaintiff, who had no right to remain at work on the quarry except what had been conferred by Libersont.

223 The stream cannot rise higher than its source. The charge excepted to treats the defendant as an intermeddler, and without right to determine who should remain and work on the quarry. On the undisputed facts in regard to determining who might remain and work upon the quarry, he was clothed with all the right and power of the owner. The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act, or threat aliunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor. But the same authorities clearly establish that if the defendant's act, or threatened act, was one which, in his relation to the property and parties, he had a lawful right to perform, ~~unless~~ it involved a superior right of the plaintiff, gave the plain-

tiff no right of action, though it occasioned a loss to him and was actuated by a desire to injure.

As said in *Walker v. Cronin*, 107 Mass. 555: "Accordingly, it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages or cause a loss to him without violating any legal right, that is, the motive, is immaterial": *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; 28 Am. Dec. 461; *Delhi v. Youmans*, 50 Barb. 316. A similar decision is *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, but the suggestion in *Greenleaf v. Francis*, 18 Pick. 118, was approved so far as this, namely, "that malicious acts without the justification of any right, that is, acts of a stranger resulting in the loss or damage might be actionable. . . . If disturbance or loss come as a result of competition, or the exercise of like rights by ²²⁴ others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with."

So, too, in *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 370, it is said: "Where one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice or other bad motive toward another does not give the latter a right of action against the former. Though there be loss or damage resulting to the other from the act, and the doer was prompted to it solely by malice, yet if the act be legal and violates no legal right of the other person, there is no right of action." In support of this doctrine a large number of decisions are cited, and among them *Chatfield v. Wilson*, 28 Vt. 49; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Harwood v. Benton*, 32 Vt. 724.

William L. Hodge in January and February numbers of *American Law Review*, in an article on "Wrongful interference by third parties with the rights of employes and employed," reviews a great number of cases and on page 54 says: "So also it is said, and there are indeed many authorities which appear to hold, that to constitute an actionable wrong, there must be a violation of some definite legal right of the plaintiff. But these are cases for the most part, at least, where the defendants were themselves acting in the lawful exercise of some distinct right which furnished the defense of a justifiable cause for their acts except so far as they are in violation of a superior right in another. Therefore, if the defendant's act be (1) legal in itself, and (2) violates no superior right in another, it is not actionable, al-

though it be done maliciously and cause damage to that other."

On the doctrine of these authorities, cited by the plaintiff, the threatened act of the defendant was one which, in his relation to the business of the quarry and Libersont, he had the legal right to do, and it would violate no superior right ²²⁵ of the plaintiff. The court should have ordered the verdict as requested at the close of the evidence.

Judgment reversed and cause remanded.

ACTIONS—MALICE.—A lawful act done in a lawful manner cannot be transformed into a legal wrong by the mere fact that the person doing it is actuated by a bad motive: *Chambers v. Baldwin*, 91 Ky. 121; 34 Am. St. Rep. 165, and note; *Bourlier v. Macauley*, 91 Ky. 135; 34 Am. St. Rep. 171. The intentional causing of loss by one man to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong: *Graham v. St. Charles etc. R. R. Co.*, 47 La. Ann. 214; 49 Am. St. Rep. 366, and note.

FOSTER v. HANCHETT.

[68 VERMONT, 519.]

MARRIAGE AND DIVORCE—BREACH OF PROMISE—UN-CHASTITY AS DEFENSE.—Knowledge of the unchastity of a woman acquired after a promise made to marry her, is a good defense to her action to recover for a breach of such promise.

DEFINITION—"LOOSE AND IMMODEST WOMAN."—A "loose woman," or a "woman of loose and immodest character" is an unchaste and sexually impure woman in the ordinary signification of such terms.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—UN-CHASTITY AS DEFENSE.—The general reputation of a woman for unchastity is no bar to her action for breach of promise of marriage. To constitute unchastity a defense the defendant must not only prove her to be actually unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry.

Hunton & Stiekney and W. E. Johnson, for the appellant.

Tarbell & Whitham, Dillingham, Huse & Howland, and J. J. Wilson, for the appellee.

³²⁰ **ROWELL, J.** This is an action for the breach of a promise of marriage. No question was made but that a contract of marriage was entered into between the parties, but the defendant claimed that it was conditional, while the plaintiff claimed that it was absolute.

The defendant introduced testimony tending to show that the plaintiff was of loose and immodest character, and had been improperly and immodestly intimate with one Fuller, who was a married man; that the plaintiff disclosed nothing of this to him,

and that he did not know of it until after he had made the promise; and that when he learned of it, he canceled the engagement by reason thereof. In the charge, the court limited this testimony to the mitigation of damages, and denied it effect as a defense, because not pleaded. The plaintiff concedes that, if matter of defense, it need not have been pleaded, but she insists that it is not matter of defense, because she says the exceptions do not mean that the testimony tended to show that she was loose and immodest in the sense of being sexually impure, but only as being such in behavior. But it is quite obvious that the first is what is meant. A loose woman, a woman of loose character, is an unchaste woman in the ordinary signification of those terms. By an unchaste woman is meant a sexually impure woman, ordinarily; and that is what the testimony tends to show the plaintiff to be. This being so, it is very clear that it was a defense, if made out and the defendant was ignorant of it ³²¹ when he made the promise. Abbott, C. J., said in *Irving v. Greenwood*, 1 Car. & P. 350, 12 Eng. Com. L. 209, that if any man has been paying his addresses to one that he supposes to be a modest person, and afterward discovers her to be a loose and an immodest woman, he is justified in breaking any promise of marriage that he may have made to her. Here the word "loose" is used in the sense of unchaste, for the defendant claimed that the plaintiff had had a child by another man. The doctrine of this case is adopted everywhere: *Capehart v. Carradine*, 4 Strob. 42; *Von Storch v. Griffin*, 77 Pa. St. 504; *Berry v. Bakeman*, 44 Me. 164; *Espy v. Jones*, 37 Ala. 379; note to *Burnham v. Cornwell*, 63 Am. Dec. 543.

In *McCarty v. Coffin*, 157 Mass. 478, the offer was to show that the plaintiff "had had an intimacy with several different men." The word "intimacy" was held to mean nothing more than close and familiar acquaintance, and hence that the testimony offered was not admissible for any purpose. The case of *Cole v. Holliday*, 4 Mo. App. 94, is not at all opposed to the general doctrine above stated, as will be seen on examination.

But general reputation of bad character in respect of chastity is no bar. In order to bar, the defendant must prove that the plaintiff is in fact what she is reputed to be: *Butler v. Eschleman*, 18 Ill. 44.

Reversed and remanded.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—UNCHASTITY AS A DEFENSE.—Plaintiff's unchastity unknown to the defendant at the time the promise was made is a good defense to an ac-

tion for a breach of promise to marry; but it is otherwise if her unchastity was known to him at the time the promise was made: *Extended notes to Shackelford v. Hamilton*, 40 Am. St. Rep. 172, and *Burnham v. Cornwell*, 63 Am. Dec. 543.

DOMESTIC AND FOREIGN MISSIONARY SOCIETY v. EELLS.

[68 VERMONT, 497.]

WILLS—JURISDICTION OF EQUITY TO PROBATE.—If exclusive jurisdiction is conferred upon probate courts in respect to wills and the probate thereof, courts of equity have no jurisdiction to establish and carry into effect a destroyed, suppressed or spoliated will.

WILLS.—JURISDICTION OF EQUITY OVER PROBATE.—AID TO PROBATE COURT.—A court of equity may aid a probate court by preserving property by injunction pending proceedings in the latter court to probate a will; but the fact that the court of equity acquires jurisdiction for such temporary or ancillary relief gives it no jurisdiction over the probate of the will, when such jurisdiction is vested exclusively in probate courts.

WILLS—JURISDICTION OF EQUITY.—If jurisdiction over the probate of wills is vested exclusively in courts of probate, a court of equity may, upon proof of the probate of a will in a court of probate, proceed with the cause in aid of such court, and grant relief to which the plaintiff shows himself entitled, and which the jurisdiction of the probate court is inadequate to give.

C. M. Wilds and W. H. Bliss, for the appellant.

J. C. Baker and S. Haselton, for the appellees.

498 THOMPSON, J. The orators claim to maintain this bill in chancery as legatees and devisees under an alleged last will and testament of Lydia E. Conroe, deceased, which it is charged was fraudulently destroyed in her lifetime by the defendant, Isaac L. Eells.

499 After the decease of Conroe, the orators, the wardens and vestrymen of the First Episcopal Society of Addison county, presented the alleged will for probate to the probate court for the district of Addison, in which district she resided at the time of her death, and probate thereof was refused. From this decision an appeal was taken by the proponents to the county court, and the question of the probate of the will is still pending therein.

The orators have no standing in court if Lydia E. Conroe died intestate. If they have any title to any part of her estate, personal or real, it is derived through her last will. If she left no will, the possession of the property alleged to belong to her estate by defendants Eells and Sperry is sufficient title to enable

them to hold the same as against the orators, who, in that event, would be mere strangers and intermeddlers as to her estate. Hence, at the outset, the orators must establish that Conroe died testate, and must establish the contents of the will so far as they claim the same constitutes them devisees and and legatees thereunder.

Defendants Eells and Sperry, by demurrer, have raised the question whether, in this state, the court of chancery has jurisdiction to establish spoliated, suppressed, and destroyed wills.

Chapter 2, article 5, of the constitution of Vermont, so far as it relates to this question, is as follows: "A future legislature may, when they shall conceive the same to be expedient and necessary, erect a court of chancery, with such powers as are usually exercised by that court, or shall appear for the interest of the commonwealth."

This article of the constitution was adopted in 1786 and has since been retained. It was thus left with the legislature to determine the powers and jurisdiction of such court when created. They might be the same as were possessed at that time by the court of chancery in England, or they might be modified as, in the judgment of the legislature, the best interest of the state might require. Under this grant of ⁵⁰⁰ power, a court of chancery was created by the legislature as early as 1788: Stats. 1788, p. 10.

From that time to the present, the powers of that court, as defined by statute, have been substantially as now declared by Vermont Statutes, section 907, which section reads: "There shall be a court of chancery, the powers of which shall be vested in a chancellor; and the powers and jurisdiction shall be the same as those of the court of chancery in England, except as modified by the constitution and laws of this state."

It is necessary to consider whether at the time of the adoption of this provision of the constitution, the court of chancery in England had jurisdiction to set up spoliated, suppressed and destroyed wills. At that time, there was no way in England by which a will devising real estate could be established and probated once for all. It was considered as a muniment of title, and was required to be proven whenever necessary to establish title, and might be attacked whenever offered in evidence before a court. The ecclesiastical courts had jurisdiction over wills of personalty. Probate of such wills, against the world, and once for all, could be made in them. If the will was of personalty and realty, the ecclesiastical court could probate it, but the probate

was not noticed by the common-law courts in respect to the reality. If the devisee was in possession, he could not maintain ejectment against the heir and thus establish his title under the will. To obviate this dilemma, courts of chancery entertained a bill in favor of such devisee against the heir to establish the will and title thereunder. This was in the nature of a bill to quiet title: 3 Pomeroy's Equity Jurisprudence, sec. 1158, and note 3; Adams' Equity, 6th Am. ed. with Sharswood's notes, *248, *249, and notes; *Buchanan v. Matlock*, 8 Humph. 390; 47 Am. Dec. 622; *Harris v. Tisereau*, 52 Ga. 153; 21 Am. Rep. 242.

There are cases where chancery formerly exercised jurisdiction to relieve against a will fraudulently obtained. But ⁵⁰¹ since the decision of *Kenrick v. Bransby*, 3 Brown P. C. 358, and *Webb v. Cleverden*, 2 Atk. 424, it seems to be considered as settled in England that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and at law, on a devise of real property: *Bennet v. Vade*, 2 Atk. 324; 3 Atk. 17; *Jones v. Jones*, 3 Mer. 171. In *Gaines v. Chew*, 2 How. 620, Justice McLean on this subject said: "In cases of fraud, equity has a concurrent jurisdiction with the court of law, but, in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal is the only one that can be given": *Keiley v. McGlynn* (*Broderick's Will*), 21 Wall. 503; 3 Pomeroy's Equity Jurisprudence, secs. 913, 914.

There are not many English cases bearing directly upon the question of the jurisdiction of chancery to set up a suppressed, spoliated, or destroyed will. *Haines v. Haines*, 2 Vern. 441, was decided in 1702. That case was this: The uncle having devised his real estate, part to the orator and part to other relatives, and disinherited the heir at law, at the funeral of the uncle, a younger brother of the heir at law snatched the will out of the hands of the executor and tore it into many small pieces, and most of them, particularly such part wherein was the devise of the land, were picked up and stitched together again. The bill was to have the will established; and it was decreed that the devisees should hold and enjoy against the heir, and he to convey to the devisees, although no direct proof was made that the heir directed the tearing of the will. The report of the case does not show that it was argued, and no reasons are given by the court for its

judgment. This case is quite analogous to the class of cases before suggested in which the devisee ⁵⁰² in possession could maintain a bill against the heir at law to set up the will to quiet his title. *Hampden v. Hampden*, 3 Brown P. C. 550, was first heard and decreed by the master of the rolls in December, 1708, then affirmed by the lord chancellor on appeal, and afterward by the house of lords in 1723. In *Dalston v. Coatsworth*, 1 P. Wms. 731, *Hampden v. Hampden*, 3 Brown P. C. 550, is stated thus: The orator claimed as devisee under the will of the defendant's father; by proof it appeared there was such a will, though no exact account was given of its contents; but inasmuch as the court was satisfied the defendant had suppressed the will, and for that, though no exact proof was made of its contents, the defendant might clear this by producing the will, therefore it was decreed that the orator, the devisee, should hold and enjoy until the defendant produced the will and further order. In 1719 was decided in chancery the case of *Woodruff and Burton*, which is stated in *Dalston v. Coatsworth*, 1 P. Wms. 731, as follows: "A devisee brought his bill against the heir, and, it being made to appear that there was such a will as the plaintiff had suggested, and that the defendant had destroyed it, the Lord Chancellor Parker decreed the defendant to convey the premises to the plaintiff in fee, and to deliver up the possession, which (his honor said) seemed to him to be the most effectual and reasonable decree."

Tucker v. Phipps, 3 Atk. 359, was decided in 1746. The bill in that case was brought by the plaintiff, suggesting that his wife's father had by his will left a legacy of fifteen hundred pounds to the plaintiff's wife, his daughter, and that the defendant had destroyed or concealed the will. The prayer was, that the defendant be decreed to pay the plaintiff fifteen hundred pounds with interest. The defendant put in three answers; in the first he admitted the will as set forth in the bill, but made no mention of any insanity in the testator; in the third he denied he ever had any such will, and averred that if there ever was any such, he could ⁵⁰³ not say whether his father was of sound mind at the time of making such will, and insisted that the plaintiff came too soon into chancery for that he ought to have cited the defendant into the ecclesiastical courts, where he might equally well have had the benefit of a discovery. Lord Chancellor Hardwick, in passing upon the case said:

"As to the spoliation, consider it generally as a personal legacy, where the will is destroyed or concealed by the executor, and, I think, in such case, if the spoliation is proved plainly,

though the general rule is to cite the executor into the ecclesiastical court, the legatee may properly come here for a decree upon the head of spoliation and suppression. . . . But here the case is stronger to entitle the plaintiff to a decree because the legacy is out of real and personal estate both, and as to the real estate, there is no occasion to prove the will in a spiritual court to entitle the legatee to recover the legacy out of the real estate. This would be clearly the case, where the charge is upon the real estate, and though the heir is entitled to have a personal estate to exonerate his real, yet, if he is made executor and has by a voluntary, fraudulent act, put the legatee under such difficulties as to make it almost impossible for him to prove the will, it is reasonable to let in the legatee to have his legacy, and leave the executor to pay himself out of the personal estate."

And the plaintiff had a decree for the immediate payment of the legacy, notwithstanding the probate of the will had not been granted. Among cases in the United States holding that chancery has jurisdiction in such cases are *Bailey v. Stiles*, 2 N. J. Eq. 220; *Buchanan v. Matlock*, 8 Humph. 390; 47 Am. Dec. 622; *Harris v. Tisereau*, 52 Ga. 153; 21 Am. Rep. 242; *Dower v. Seeds*, 28 W. Va. 113; 57 Am. Rep. 646; *Anderson v. Irwin*, 101 Ill. 411; *Hall v. Allen*, 31 Wis. 691; *Banks v. Booth*, 6 Munf. 385; *Brent v. Dold*, Gilm. 211. Among text-writers adopting this view are 3 *Redfield on Wills*, 16; *Perry on Trusts*, sec. 183; 1 *Story's Equity Jurisprudence*, sec. 254. In the case of *Mead v. Langdon*, not reported but decided in Washington county in 1834, and cited in *Adams v. Adams*, 22 Vt. 59, this court set up and decreed the payment ⁵⁰⁴ of legacies, given in a will never proved in a probate court, but which had been suppressed by those interested in the estate and administration obtained without regard to the will. We think that at the time of the adoption of article 5, chapter 2, of our constitution and the establishing of a court of chancery by the legislature, the court of chancery in England had jurisdiction to set up spoliated, suppressed, and destroyed wills, and that the same jurisdiction is possessed by our court of chancery unless it has been modified or taken away by statute.

Has this jurisdiction been taken from the court of chancery by the legislation of this state? At an early date in its history probate courts were established and have ever since been retained. They are courts of record: *Vermont Stats.*, sec. 2322. They have jurisdiction of probate of wills disposing of personal or real estate or of both, of the settlement of estates, the appoint-

ment of guardians, and the powers, duties, and rights of guardians and wards, of the issuing of letters testamentary, and the appointment of administrators and of issuing letters of administration: Vermont Stats., secs. 2325, 2371-2373. The probate of a will by the probate court having jurisdiction thereof, upon due notice, is conclusive as to its due execution as against the whole world: Vermont Stats., sec. 2356; *Foster v. Dickerson*, 64 Vt. 233. The probate court has jurisdiction to probate lost, suppressed, spoliated, and destroyed wills: *Minkler v. Minkler*, 14 Vt. 125; *Dudley v. Wardner*, 41 Vt. 59; *Carey v. Berkshire R. R. Co.*, 84 Am. Dec. 628, note; *Schouler on Executors*, sec. 84. It has power to vacate its decree admitting a will to probate. It may thus revise its proceedings for fraud, mistake, or illegality: *Hotchkiss v. Ladd*, 62 Vt. 209; *Smith v. Rix*, 9 Vt. 240; *Adams v. Adams*, 21 Vt. 162; *French v. Winsor*, 24 Vt. 407; *Waters v. Stickney*, 12 Allen, 1; 90 Am. Dec. 122; 3 *Redfield on Wills*, 56, 64, 123, 124; *Perry on Trusts*, 182. With this power there would seem to be no necessity for resorting to chancery ⁵⁰⁵ to establish rights to property under a will fraudulently spoliated or destroyed, or fraudulently set up or suppressed, by decree of the probate court or otherwise. The probate court has full jurisdiction in respect to the settlement and allowance of accounts of executors and administrators, of the allowance of claims at law against the decedent's estate, and of the marshaling and distributing the assets thereof. It has also an extensive chancery jurisdiction, by which claims, in some respects of purely equitable cognizance, may be there adjusted: *Adams v. Adams*, 22 Vt. 59. But it does not follow that because jurisdiction to probate all kinds of wills has been granted to probate courts, that courts of chancery have been deprived thereby of a concurrent jurisdiction to establish a will like the one in question.

The rule in such case as stated in 3 *Pomeroy's Equity Jurisprudence*, section 1153, is this: "One fundamental principle should be constantly kept in mind; it underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with re-

spect to such particulars as it has been abrogated by express prohibitory, negative language of the statutes, or by necessary implication from affirmative language conferring exclusive powers upon the probate tribunals. This equitable jurisdiction may be dormant, but, except so far as thus destroyed by statute, it must continue to exist, concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient."

When exclusive jurisdiction is conferred upon probate courts in respect to wills and the probate thereof, chancery has no jurisdiction to establish and carry into effect a destroyed, suppressed, or spoliated will: *Gaines v. Chew*, 2 How. 619; *Keiley v. McGlynn* (*Broderick's Will*), 21 Wall. 503. And it seems to be now ⁵⁰⁶ the settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or the validity of a will which the ecclesiastical or probate court is competent to adjudicate: *Keiley v. McGlynn*, 21 Wall. 503.

Vermont Statutes, section 2356, is as follows: "No will shall pass either real or personal estate, unless it is proved and allowed in the probate court, or by appeal in the county or supreme court, and the probate of a will of real or personal estate shall be conclusive as to its due execution."

This section was enacted subsequent to the decision of *Mead v. Langdon* (not reported), in the revision of 1839, and has ever since been retained in all subsequent revisions: Revised Statutes, c. 45, sec. 20. Vermont Statutes, section 2355, provides that attested copies of wills devising real estate and of the probate thereof, shall be recorded in the office of the clerk of the town in which the land lies. Vermont Statutes, sections 2365 and 2369, provide for probate by probate courts of wills made out of the state pursuant to the laws of the state or country in which they were made, and of wills allowed in any other of the United States or in a foreign country according to the laws of such state or country.

The case of *Morningstar v. Selby*, 15 Ohio, 345, 45 Am. Dec. 579, was a bill in chancery to establish a spoliated will, and the question adjudicated was, whether chancery, under the Ohio probate system, had jurisdiction to establish such a will. The fifth section of the constitution of Ohio provided that the court of common pleas in each county should have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as should be pre-

scribed by law. Section 4 of the act to organize the judicial courts had this provision: "The court of common pleas shall have power to examine and take the proof of wills, grant letters testamentary, etc., and to hear and determine all causes of probate and testamentary nature."

The supreme court of Ohio in that case held that chancery had no jurisdiction in respect to establishing such a will. ⁵⁰⁷ It said, referring to the court of common pleas as a probate court: "The act relating to wills still keeps up and sustains the same separation of jurisdictions. The probate is of the original jurisdiction of that court, and so recognized by the act in which the proof is prescribed, the mode of proceeding, and the effect of the record. And in Swan's Statutes, section 33, page 996, it is declared that 'no will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate, etc., as provided by the act.' The act makes no mention of any method of establishing a will by chancery proceedings. The probate is treated as a judicial act at law, binding upon all parties, and final and conclusive upon all parties. . . . To test the propriety of encroaching, in any manner, upon a jurisdiction so peculiar, and which from its nature ought to be exclusive, let us anticipate some of the difficulties which might flow from entertainig this bill. A decree in chancery is not the probate of a will. Hence, a decree establishing a will cannot operate to give it vitality and is utterly powerless, or else the thirty-third section of the statute relating to wills must be taken and held, pro tanto, repealed by the decree. The decree and the statute would speak different language upon the same subject. One would say the will of Morningstar is effectual to pass real and personal property, without admission to probate, as the act provides; the other, that it is of no effect. The conflict is irreconcilable, and the weaker in the contest must give way. Again, what would be the effect, if, after rendering a decree either for or against the validity of the supposed lost will, a real and different will should be produced? Is the litigation a bar to its probate? Does it oust the court of common pleas of jurisdiction? Might not the will then be called for, be produced, be proved, and admitted of record, and would it not be effectual to vest titles according to the devises and bequests of the testator? We think it would, because the chancery proceeding would be regarded wholly coram non judice and void, and because the statute would enforce its production, and is express as to the effect of the probate." The decision of this case

turned on the provision of the law of Ohio like Vermont Statutes, section 2356.

The jurisdiction of chancery in the settlement of estates ⁵⁰⁸ under our system of probate courts has been frequently passed upon by this court. One of the recent decisions on that subject is *Blair v. Johnson*, 64 Vt. 598, in which case the orator brought a bill for the construction of a will. The prayer of the will was denied by this court on two grounds, one of which was, that no occasion had arisen, or was likely to arise, requiring a construction of the will, assuming it to be doubtful. The other ground is stated in the opinion of the court by Rowell, J., thus: "But there is another point, not much touched on in that case (*Morse v. Lyman*, 64 Vt. 167, that is involved in this class of cases. In respect of the settlement of estates of deceased persons, the jurisdiction of the court of chancery in this state is not original, nor concurrent with that of the probate court, but is special and limited, and only in aid of the probate court when its powers are inadequate. Further than that the court of chancery has nothing to do with the settlement of such estates. It follows, therefore, that if at the time a question as to the construction of a will needs to be decided the probate court can be resorted to, and its jurisdiction is adequate for the purpose, that court must be resorted to, and chancery cannot be. It may be that this point has not always been kept in mind by our courts, but it is the inevitable deduction from our decisions. To the same effect are *McCullum v. Hinckley*, 9 Vt. 143; *Morse v. Sloson*, 13 Vt. 296; *Adams v. Adams*, 22 Vt. 50; *French v. Winsor*, 24 Vt. 402; *Merriam v. Hemmenway*, 26 Vt. 565; *Boyden v. Ward*, 38 Vt. 630; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115; 38 Am. Rep. 661; *Angus v. Robinson*, 62 Vt. 60; *Morse v. Lyman*, 64 Vt. 167; *Brown v. Brown*, 66 Vt. 81; *Ward v. Congregational Church*, 66 Vt. 490; *Davis v. Eastman*, 66 Vt. 651..

It is said that *Wetherbee v. Chase*, 57 Vt. 347, supports the contention of the orators that equity has jurisdiction to establish the will in question. That case was this: Ichabod Chase, by his last will devised to his son, Wait Chase, eighty-seven acres of land upon condition that he pay to the orators, the testator's infant grandchildren, who were not his ⁵⁰⁹ heirs, six hundred dollars, to be equally divided among them. Wait Chase was named as executor in the will. It was allowed by the probate court, and he took an appeal from the decision allowing it to the county court. An agreement was then entered into by the heirs and widow of Ichabod, by which the estate was divided among them,

by mutual conveyances to each other. In such division Wait Chase took absolutely the eighty-seven acres of land upon which the legacy to the orators was charged. By consent, a judgment was entered in the county court disallowing the will, which judgment was certified to the probate court and there recorded. At the time of these proceedings the orators were minors without the appointment or intervention of any guardian, and in nowise parties to the agreement. The bill was brought to charge the land still owned by Wait Chase, with the payment of the six hundred dollars to the orators. It was originally brought against him alone, but, by a pro forma ruling of the chancellor, the other heirs and the widow were made parties defendant. Decree was, that the legacy of six hundred dollars, with interest, was due the orators, and that the payment of the same be made a charge upon the land. In passing upon the case, this court, by Taft, J., said:

"It is said that the doctrine is settled that a court of equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish one suppressed by fraud; for, in such cases, the proper remedy is exclusively vested in the probate or ecclesiastical courts: *Smith's Manual of Equity*, 57; *Story's Equity Jurisprudence*, sec. 184, and note. But it is also as well settled that where fraud does not go to the whole will, but only to some particular clause, courts of equity will lay hold of the circumstances to declare the executor trustee for the 'legatee': *Story's Equity Jurisprudence*, sec. 440; *Smith's Manual of Equity*, 57; *Mitford's Equity Pleading*, 257; 1 *Perry on Trusts*, sec. 183. It is insisted, and we think correctly, that the reason why a court of equity has no jurisdiction, either to establish, or set aside a will, is, that those questions are within the exclusive jurisdiction of the probate courts; but that reason does not extend to the case at bar. The proceedings in this cause do not seek to establish the will ⁵¹⁰ of Ichabod Chase, but to charge upon the land in question the legacy given the orators, of which they have been deprived by the fraud of the defendant Wait. To make the payment of the legacy a charge upon the land, without reference to establishing the will, the probate court has no power whatever. The case, therefore, falls within the general rule that courts of equity have jurisdiction in all matters of fraud. . . . As between the parties to this cause, the will may well be considered as proved in the probate court, and the appeal vitiated by the fraud of Wait Chase. The orator's title to the legacy or the land is by virtue of the decree of the court of chancery, not by virtue of the will. The effect of the decree below was not to establish the will; and

the persons made defendants by order of the chancellor are not proper parties to this proceeding; and the pro forma decree making them such is reversed. As to them the bill should be dismissed; in all other respects the decree is affirmed and the cause remanded."

It may be difficult to reconcile this case with the adjudged cases or other authorities bearing upon the subject. The county court, as the appellate probate court, had ample power to set aside the disallowance of the will, and, on proper proof, to allow it, thus establishing the legacy charged upon the land. The judgment disallowing the will, though obtained by fraud as against the orators in that case, was a valid judgment of a court of competent jurisdiction, and binding, until set aside by proper proceedings, in that court, or in some court having jurisdiction to set it aside; yet the decree for the orators was rendered without setting it aside. The difficulty is not met by saying that the judgment of the probate court might well be treated as in force and the appeal vacated by the fraud, because the appeal was in fact perfected, the judgment of the probate court vacated, and the judgment of the county court rendered disallowing the will. Neither the probate court nor the court of chancery had any power to establish the legacy except by force of the will. If there was not a valid will, there was no legacy and no fraud, and nothing to give either ⁵¹¹ court jurisdiction in respect to the legacy. The alleged fraud was not of the character in which executors have been declared trustees for the legatees, under a will properly proved and allowed, and the decision does not finally go on that ground: *Allen v. McPherson*, 1 Phill. Ch. 133; affirmed in 1 H. L. Cas. 191; *Keiley v. McGlynn*, 21 Wall. 503. In *Allen v. McPherson*, 1 Phill. Ch. 133, it was claimed that a final codicil to the will in question, which revoked certain provisions in the will favorable to the orator, and which was established by the ecclesiastical court, was obtained by the fraud of the defendant. A demurrer to the bill having been sustained and the bill dismissed, the case went to the house of lords on appeal; and the whole discussion turned upon the question whether or not the ecclesiastical court had jurisdiction to inquire into the matters of fraud alleged; and the court being of the opinion that it had jurisdiction, the decree was affirmed. Lord Lyndhurst also reviewed the cases in which a legatee or executor had been declared a trustee for other persons, and came to the conclusion that they had been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such,

or in which the probate court could afford no adequate or proper remedy. The effect of his reasoning was, that where a remedy is within the power of the ecclesiastical court, either by granting or refusing probate of the whole will or codicil, or of any portion thereof, a court of equity will not interfere. And this was a view of a majority of the law lords on that occasion, Lords Brougham and Campbell agreeing with Lord Lyndhurst. This seems to be now the settled rule in England. In the case of a foreign will, it was held by the United States supreme court in *Armstrong v. Lear*, 12 Wheat. 170, that a bill in equity could not be maintained against the personal representative of the alleged testator, for a legacy, until the will had been admitted to probate by the court in this country having jurisdiction⁵¹² of the probate of wills and other testamentary matters. The division of the estate of Ichabod Chase by the heirs and widow would in nowise have affected the jurisdictions of the probate court over the same, if the will had been established in that court.

But whatever may be thought of the law or the logic of the decision in *Wetherbee v. Chase*, 57 Vt. 347, it explicitly declares that it does not establish the will, and that a court of equity in this state has no jurisdiction to establish or set aside a will, and that such jurisdiction is exclusively within the jurisdiction of the probate courts. Hence, it is not an authority for the orators in the case at bar.

The question as to the effect of the Revised Laws, section 2049, which is the same as Vermont Statutes, section 2356, was before this court in *Walton v. Hall*, 66 Vt. 455. The will of John Walton had been legally probated in Illinois but not here, the administration there being ancillary. In passing upon the effect of the will here, the court by Rowell, J., said: "We have no statute allowing that probate to make the will effective to pass property having its situs here; but, on the contrary, our statute provides that no will shall pass either real or personal estate unless it is proved and allowed in the probate court or on appeal in the county or supreme courts: Rev. Laws, sec. 2049. This, of course, refers to property located here. It follows, therefore, the will not having been proved and allowed here, that it cannot pass property located here."

The probate court and the county court as an appellate probate court, have ample jurisdiction for establishing spoliated, suppressed, and destroyed wills. It logically follows from the express provisions of Vermont Statutes, section 2356, our probate laws, and our decisions, as well as the decisions of other courts,

American and English, that the jurisdiction of chancery to establish such wills is abrogated, and we so hold. To hold otherwise would in effect repeal Vermont Statutes, section 2356, and would contravene the decisions of this court in respect to the exclusive jurisdiction of the probate courts. It is apparent, ⁵¹³ in view of the fact that this section was enacted subsequent to the decision in *Mead v. Langdon* (not reported), that it was intended to confer exclusive jurisdiction over the proof and allowance of wills, upon the probate courts, and thus, by way of appeal to the county court, secure to all persons interested the right of trial by jury of all issues of fact involved in the probate of a will: Vermont Stats., secs. 2584-2595. Our probate system is thus made harmonious, and in accord with the spirit of the common law, which regarded wills as muniments of title, and to be established as such. The enactment of that section in the revision of 1839 overruled *Mead v. Langdon*.

The defendants, Eells and Sperry, claim title to the property in question by virtue of a certain conveyance and transfers of the same to them by Conroe in her life, and the orators claim title thereto under the alleged spoliated will.

Hence, the issue pending between the parties in the county court, though in form the question of the probate of the will, is, in fact, so far as the orators are concerned, a question of title. The case standing thus, jurisdiction is not conferred upon the court of chancery to establish the will, because the orators' bill prays for an injunction or for equitable relief, other than the setting up of the will. The case is analogous in principle to *Griffith v. Hilliard*, 64 Vt. 643, and *Stetson v. Stevens*, 64 Vt. 649, in which the title of the orator was involved, and which the court of chancery refused to determine, although a temporary injunction was granted, and remitted him to the court of law to establish his title. In view of the effect of Vermont Statutes, section 2356, chancery cannot draw to itself jurisdiction to set up a will by granting some other equitable aid. It can only supplement where there is a shortage in the powers of the probate court to protect the rights of the parties, by supplying such shortage if it comes within the scope of equity, and no more.

In a cause like this, the court of chancery may, in its discretion ⁵¹⁴ and for sufficient cause shown, issue a temporary injunction to prevent any disposition of the property in controversy, and may make such further orders as may be necessary to preserve the same, and continue such injunction and orders in force for such reasonable time as may be necessary to enable the

orators to establish the will in the county court. If the will is there proved and allowed, such allowance does not necessarily establish the right of the orators to the property, as Conroe may have been competent to contract at the time she executed the conveyance and transfers to Eells and Sperry, although not of sound mind at the time of the alleged destruction of her will. If the will is established, letters testamentary or of administration issued, and the estate settled in due course in the probate court, it may be found that the powers of the probate court are inadequate to give the orators such relief as they may be entitled to have to make good their title under the will and relieve it from any cloud that defendants Eells and Sperry may have cast upon it, by any unlawful act of theirs. In such event, chancery may, upon proof of the probate of the will in the county court, proceed with the cause in aid of the probate court, and grant such relief as the orators may establish that they are entitled to, which the jurisdiction of the probate court is inadequate to give. To this end the cause may be retained by the court of chancery: *Griffith v. Hilliard*, 64 Vt. 643; *Stetson v. Stevens*, 64 Vt. 649, *French v. Winsor*, 24 Vt. 402; *Bennett v. Wade*, 3 Atk. 17.

This view of the case renders it unnecessary to pass upon the effect of the orators having elected to proceed in the probate court for the proof and allowance of the alleged will and the pendency of such proceedings in the county court on appeal.

The pro forma decree of the court of chancery is reversed; the demurrer contained in the answer of the defendants ⁵¹⁵ Isaac L. Eells and A. Elizabeth Sperry is overruled, and the orators' bill adjudged sufficient; and the answer of defendants Eells and Sperry is ordered brought forward, from which and the orators' bill it appears that the proof and allowance of the alleged last will and testament of Lydia E. Conroe, deceased, late of Middlebury, in the county of Addison, and under which will the orators claim title, is in controversy; therefore, the cause is remanded to the court of chancery, with direction to that court to retain the case, and to make such further temporary orders as may be necessary to preserve the property in controversy, and to continue such orders and the injunction for such time as, in the opinion of said court, may be necessary to enable the orators to prove and establish said will in the county court where proceedings for the probate thereof are now pending; and in default of the orators so proving and establishing said will within the time limited as aforesaid, their bill to be dismissed with costs to the defendants. If within the aforesaid time, the orators prove and

establish said will by a final judgment of the county or supreme court, let the court of chancery further retain said cause; and if, in due administration of the estate of said Conroe, the jurisdiction and powers of the probate court for the district of Addison prove inadequate to establish and protect the rights and title of the orators under said will, in the property, personal and real, in controversy, the court of chancery is directed to further proceed with said cause to the extent of granting the orators such relief in the premises as they may be entitled to in equity, and which the powers and jurisdiction of said probate court are inadequate to grant. If such ancillary aid of the court of chancery shall not be needed, then, finally, let the bill be dismissed upon such terms in respect to costs, as that court may deem equitable. Defendants Eells and Sperry to recover their costs in this court.

WILLS—PROBATE—EQUITY JURISDICTION.—A court of chancery has jurisdiction to set up a will which has been lost, suppressed, or destroyed: *Buchanan v. Matlock*, 8 Humph. 390; 47 Am. Dec. 622, and note. Chancery courts have no original jurisdiction to try the validity of a will of personalty, but this jurisdiction belongs exclusively to the probate courts: *Note to Colton v. Ross*, 22 Am. Dec. 652.

SMITH v. COOLIDGE.

[68 VERMONT, 516.]

CONTRACTS PAYABLE IN SPECIFIC ARTICLES at a time and to an amount specified, may, within that time, be paid either in such articles or in cash, but after the expiration of such time become payable in money alone if required by the creditor.

CONTRACTS PAYABLE IN SPECIFIC ARTICLES — DEFAULT.—REINSTATEMENT.—If a contract is payable in specific articles as ordered, failure to fill an order makes the contract payable in cash, and the mere acceptance of another order in the course of business does not reinstate the contract.

CONTRACTS — PAYABLE IN SPECIFIC ARTICLES — BREACH.—If a contract payable in specific articles has been broken, and has become payable in money, the creditor cannot thereafter accept part payment in goods at his pleasure, and still require that further payments be made in money.

A. E. Cudworth and L. M. Read, for the appellant.

Waterman, Martin & Hitt, for the appellee.

518 **MUNSON, J.** The referee reports that the defendant purchased of the plaintiff a quantity of maple sugar, and agreed to pay for it in confectionery, to be delivered to the plaintiff at South Londonderry, at such times and in such quantities as the

plaintiff should thereafter order. It is also found, in regard to certain shipments of confectionery, that the price and quality of the goods were satisfactory to the plaintiff. ⁵¹⁹ It is evident from these findings that a price was put upon the maple sugar and that the amount was to be paid in confectionery at the current rates. So the case presented is that of a sale in consideration of a payment to be made in specific articles; and it is to be disposed of in accordance with the rules heretofore held applicable in such cases.

In this state, an agreement to pay in specific articles is presumed to have been intended for the benefit of the debtor, and is held to entitle him to make payment either in the property named or in cash. But, if the obligation is not met when due, this option is lost, and the debtor must then make payment in money at the price fixed. The demand is afterward treated in every respect as if it had always been payable in money, except as regards negotiability in cases where the obligation is in the form of a note: *Chipman on Contracts*, 35; *Wilkins v. Stevens*, 8 Vt. 214; *Perry v. Smith*, 22 Vt. 301; *Kent v. Bowker*, 38 Vt. 148.

In this case Batchelder's failure to fill the order sent in May was a breach of the contract as regards the time of payment, and the unsatisfied balance thereupon became payable in money. It was, of course, competent for the parties, by a sufficient agreement, to reinstate the contract in its original terms; but the ordering of another bill of goods upon the solicitation of the defendant, without any accompanying expression of intention, was not sufficient to accomplish this. It had no more effect than a similar transaction would have had in the case of an ordinary note. The obligation having become payable in money, the plaintiff could accept part payment in goods at his pleasure, and still require that further payment be made in money.

Judgment reversed and judgment for plaintiff.

Taft, J., did not sit, being in county court.

PAYMENT IN SPECIFIC ARTICLES. — In all cases where the debtor has an option to pay the debt either in money or in specific articles he can exercise that option up to the time when the note becomes due. But all the authorities are agreed that after the note is overdue it can be paid in money only: *Extended note to Roberts v. Beatty*, 21 Am. Dec. 425.

RUTLAND ELECTRIC LIGHT COMPANY v. BATES.

[68 VERMONT, 579.]

CORPORATIONS—POWER TO COMPEL OFFICER TO ACCOUNT FOR PROFITS.—A corporation may, upon discovering the fact, compel one of its officers or directors to account for any profit or commission he has made upon a corporation contract.

CORPORATIONS—POWER TO COMPEL OFFICER TO ACCOUNT FOR COMMISSIONS RECEIVED.—An officer in a corporation who, in making a contract for it, secretly and fraudulently makes an arrangement by which he and two other directors in the corporation are to receive a commission out of the transaction, is liable to the corporation for all of the commissions so arranged for and received.

CORPORATIONS—CONVERSION BY OFFICER.—If an officer in a corporation takes notes payable to it for its capital stock, which is never issued, and upon ceasing to be an officer in the corporation he refuses to surrender the notes, on the ground that they are lost and are not the property of the corporation, he is guilty of conversion, and must account to the corporation for their value, but he is then entitled to control the stock for which the notes are given.

CORPORATIONS—LIABILITY OF OFFICER FOR PROFITS RECEIVED—BURDEN OF PROOF.—If, after a corporation has entered into a contract for the performance of which its treasurer is authorized to pay out its money, he enters into a secret and fraudulent agreement by which he is to derive a profit from the performance of the contract, the corporation may elect to treat it as void, and hold him for the whole amount paid out thereunder, and to avoid liability the burden of proof is on him to show that he has paid out only what the work was reasonably worth, and not to exceed its actual cost.

C. A. Prouty, G. W. Lawrence, and C. H. Joyce, for the appellant.

J. C. Baker, for the appellee.

384 ROSS, C. J. During the period covered by the accounting the defendant was a director, treasurer, and principal manager of the orator. His solicitor does not contend that, while occupying these relations, he could make purchase for the orator, which would authorize him to pay therefor, as treasurer, more than the price required by the vendor; nor that he could make contracts, in the name of the orator, which would authorize him, as treasurer, to pay thereon more than required by the other parties to the contracts. He could not from such purchases or contracts, obtain authority to pay himself a commission, or profit, nor to pay any other director, or manager, of the orator a commission or profit thereon. Such is the well-established law, by many decisions. In Cook's Law of Stocks and Stockholders, section 649, it is stated: "The law is well settled that a director cannot become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between the

company, of which he is a director, and third persons. The director cannot be interested in the construction company at the time the contract is made, nor subsequently, and it is immaterial that the contract is fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract. . . . Nor is a contract valid and enforceable against the corporation where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract."

These propositions the author sustains by the citation in the notes of a large number of well-considered decisions of courts of last resort. Rarely are there found in a single case more or more pronounced violations of these well-settled principles of the law than are contained in the report of the master in this case; and from his report it is evident that the violations were knowingly and fraudulently committed.

Some of the items allowed by the master were errors in the defendant's accounts as treasurer; some, which were not such ⁵⁸⁵ error, are now uncontested. We shall notice only the items contested.

The first contested item which the master allowed is item 5. In this the master allows against the defendant three thousand and six dollars and twenty-five cents commission allowed to the defendant and two other directors by Thompson-Houston Co., on a purchase made by the defendant in the name of the orator. This commission was paid through an apparent purchase of stock of the orator by Thompson-Houston Co. The stock was transferred to an agent of Thompson-Houston Co., and by him to the orator and the two other directors. The defendant charged himself with the price of this stock, as so much cash received, and credited himself with having paid Thompson-Houston Co. three thousand and six dollars and twenty-five cents more than in fact he did pay them. The stock was worth the price at which it was charged. The defendant signed the stock certificates as treasurer of the orator. The whole scheme was gotten up and carried out by the defendant secretly and unbeknown to the directors who did not share in this sum. The defendant insists that no recovery can be had for this sum of him alone, and, for this reason, none in this suit to which the other directors are not parties. But this stock was assets of the orator, for which the defendant was accountable, as fully as for its money. He treated it as so

much money received by him. But whether treated as stock or money, the defendant is accountable for it. If treated as stock he has converted so much to his own use by transferring it to himself and the others wrongfully. Whether considered as stock or money, it was the property of the orator in his hands. He is accountable for it. His accountability is not lessened nor affected, because he unlawfully transferred a part of the stock to two of the other directors who are not parties to this suit. In thus transferring the stock the defendant knew that he was parting with the property of the orator, without receiving anything for it in fact, and without accounting for it. To cover the fraud he charged himself with having ⁵⁸⁶ sold the stock at its par value, and with having received the money therefor, and then he credited himself with having paid Thompson-Houston Co. this sum more than he in fact paid them. He is clearly accountable in any view for this amount charged him by the master.

2. In item 7 the master has charged the defendant with the amount of the two notes given the orator for the purchase of its stock. The stock has never been transferred to the makers of the notes. The makers are financially responsible. The defendant has not turned these notes over to his successor in office and claims they never were the property of the orator, and says he does not know where they are. The master has found that the notes are valid, against responsible makers, belong to the orator, were in the hands of the defendant, and that he not only does not pass them to his successor in office, but denies that they belong to the orator. They were the property of the orator in his hands, as its treasurer, and he has not accounted for them. It is contended that, on the facts found by the master, the orator could lawfully collect these notes of the makers and therefore the defendant is not accountable for them. The lawful right of the orator to collect them of the makers does not show an accounting for them by the defendant. He does not show that they have been lost without his fault. He claims that they never were the property of the orator, and does not account for them as such. As its treasurer it was his duty to keep them safely and pass them to his successor in office. It was his duty to know where they were. When he denies that they are the property of the orator and says he does not know where they are, he impliedly admits that he has wrongfully parted with them, has exercised wrongful dominion over them. Under the circumstances we think his denial that they ever were the property of the orator and failure to pass them to his successor in office or to account for them is a conver-

sion of the notes: *Robbins v. Packard*, 31 Vt. 570; 76 Am. Dec. 134. This entitles the orator to recover ⁵⁸⁷ for the value of the notes. But in this case the defendant is entitled to control the stock of the orator, for which these notes were given.

3. The orator excepts to the master's report because he has failed to allow item 37. This item is for six thousand nine hundred and sixty dollars paid by him in fact to himself for installing fifty arc lights. The defendant caused the contract for doing this work to be made with Wing, the agent of the Thompson-Houston Co., on the understanding that it should be transferred to himself and other directors. It was so assigned, and the defendant and other directors performed the contract. The defendant procured votes to be passed by the directors of the orator, directing him to pay this sum to Wing, under the contract. This was done to carry out his fraudulent scheme, and to keep all knowledge of it from the directors not engaged in it. Under these votes the defendant paid himself this sum. The master has found that a profit was made on the contract, but, from the manner in which the books were kept, under the defendant's management, the master is unable to ascertain the amount of profit, and for that reason wholly disallows this item. It is apparent that this disallowance is made upon the basis that the burden was upon the orator to show the amount of profit realized. In this consists the master's mistake. From public policy and from the general principles governing the law of agency and of trusts, as well as from the authorities cited by the solicitors for the orator, the defendant, in either capacity, of director, treasurer, or general manager, could not, by contracting, in legal effect, with himself, or with himself and other directors, bind the orator. Such contracts are void at the election of the orator. Doubtless, the orator could hold the defendant and the other interested directors to the fulfillment of the contract if it so elected. The defendant and other interested directors could not take advantage of their own wrong, if the orator, on being made aware of the contract, elected to hold them to its performance. By bringing ⁵⁸⁸ this suit, and calling upon the defendant to account for the money he paid to himself for the performance of the contract, or for installing the fifty arc lights, the orator has elected to treat the secret contract entered into, in the name of Wing, but in legal effect, in the name of the defendant and the other interested directors, as void, and has called upon the defendant to account for six thousand nine hundred and sixty dollars of its money, which the defendant in fact paid to Wing, but in fact

paid to himself, for performing this work. The orator having thus elected to treat the contract for the performance of this work as void, the contract is no longer the measure of the price of its performance. The defendant and other interested directors can be allowed for its performance only such a sum as it was reasonably worth, not to exceed its cost. The defendant must account for this sum of money belonging to the orator. But showing this contract with himself and other interested directors in fact, though in form a contract with Wing, and its performance by them, and their receipt of the money under it, does not legally account for the sum of money because, as regards the orator the contract had no binding force. The burden is therefore upon the defendant to show that he had lawfully paid out this sum of money for the performance of the work. This he can only do by showing what the performance of this work under all the facts and circumstances was reasonably worth, not to exceed what it cost. He stands charged with this sum of money, and the burden is upon him to show that he has legally paid out every dollar of it for the benefit of the orator. It matters not that other directors were interested with him in doing this work, and that he paid some of it to such other directors. He knew his and their relations to the orator and to this work, and can be credited in reduction of this sum only for so much as he can show that the performance of this work under all the attending circumstances was reasonably worth and cost. If he has paid some of it unlawfully to other interested directors, he did it at his peril. Neither is his accountability lessened nor waived by the fact, ⁵⁸⁹ if such is the case, that the orator might have pursued the other interested directors, or himself and other interested directors jointly. He had the orator's money, and must stand charged therewith until he can show such facts as legally justified and authorized him to part with it. This he has not done. From the facts reported, it is evident that the master proceeded upon the wrong basis in wholly disallowing this item. The orator's exception in regard to this item is sustained, and the case must be recommitted to the master for him to proceed in regard to this item on the basis indicated.

Upon all the other items the finding of the master's report is sustained.

Decree reversed, cause remanded with a mandate in accordance with the views herein expressed.

CORPORATIONS—POWER TO COMPEL OFFICER TO ACCOUNT FOR PROFITS.—All secret profits derived by an officer in any dealings

in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made is also of advantage to the corporation: *Bird Coal etc. Co. v. Humes*, 157 Pa. St. 278; 37 Am. St. Rep. 727, and note. See, especially, on this subject the extended notes to *Beach v. Miller*, 17 Am. St. Rep. 298, and *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 466-471.

SHEERAN v. SPARHAWK.

[68 VERMONT, 603.]

DEBTOR AND CREDITOR—IMPRISONMENT OF DEBTOR—SUSPENSION OF REMEDIES.—The confinement of a debtor in jail on execution does not suspend collateral remedies to enforce satisfaction of the debt.

DEBTOR AND CREDITOR—IMPRISONMENT OF DEBTOR—SUSPENSION OF REMEDIES—RIGHT TO PURSUE SURETY.—The imprisonment of a debtor on execution does not suspend the right of the creditor to maintain an action for the satisfaction of the debt against such debtor's surety on his appeal bond. The latter remedy is collateral.

H. Ballard and J. H. Macomber, for the appellant.

D. J. Foster, for the appellee.

604 *MUNSON, J.* The plaintiff brings this action of debt upon a recognizance entered into by the defendant upon the taking of an appeal by one Rockwood from a judgment rendered against him in a suit brought by this plaintiff to recover the possession of certain premises. The condition of the recognizance prescribed in such cases is, that the defendant shall enter the action in the county court, and pay the rent then due, and intervening rent, damages, and costs. The defendant pleads in bar that the plaintiff caused said Rockwood to be committed to jail on an execution issued upon said judgment. The plea is demurred to.

Upon this state of the pleadings, it is to be assumed that the debtor is still in prison: *Kinsman v. Page*, 22 Vt. 628; and it is said in some of our cases that as long as the debtor continues in prison the creditor can have no other remedy: *Farnsworth v. Tilton*, 1 D. Chip. 297; *Kinsman v. Page*, 22 Vt. 628. But it will be noticed that the cases in which this language was used were suits on the judgment, and that, in the latter case, the exact point of decision was, that while a debtor's body is held in execution the right of action on the judgment is suspended. It has also been held that a creditor cannot hold his debtor's body in execution and pursue his estate at the same time, and that the lien of an attachment is **605** lost by committing the debtor to jail: *Willard v. Lull*, 20 Vt. 373. This restriction upon the pursuit

of other remedies is put upon the ground that the taking of the body in execution is a quasi satisfaction of the debt; and it can be urged with some force that this reason would require the suspension of all remedies while the debtor remained in prison. But a distinction is generally made between direct and collateral remedies, and this distinction has been repeatedly recognized in our decisions. It is said in the case last cited that the commitment does not operate as a release of collateral remedies which are so far perfected as not to depend for their support upon proceedings under the execution, and that the creditor may pursue bail for costs, for appeal, or review, and still hold the body of his debtor. The same doctrine was recognized in the earlier case of *Roger v. Davis*, 1 Aiken, 296.

It is claimed, however, that *Hartland v. Hackett*, 57 Vt. 92, is an authority for the defendant's position. In that case, the plaintiff held its delinquent tax collector in jail on an extent, and prosecuted a suit on his bond as collector; and it was held that the two remedies were elective and not concurrent, and that the prosecution of one was a bar to the other. The case was disposed of on this ground, without considering whether the imprisonment of the defendant was in any sense a satisfaction of the debt. This case may have been rightly decided, but it is certain that the opinion fails to distinguish properly between consistent and inconsistent remedies. Clearly, the remedy upon this recognizance is not inconsistent with the remedy against the debtor's body, and the case cannot be disposed of on the ground of election.

If the plea is to be held sufficient, it must be upon the ground that the taking of the body in execution is a quasi satisfaction of the debt. But this court, while holding that the imprisonment is to be treated as a quasi satisfaction as regards other remedies against the debtor or his estate, has said that it was not to be so treated as regards collateral ⁶⁰⁶ remedies. If it be urged that a logical treatment of the rule would require its application to all remedies, it may be remarked that the rule itself is founded upon a fiction, and that mere inconsistency is not a sufficient ground for overturning an established distinction by which the scope of an arbitrary rule is arbitrarily restricted. But we think the exclusion of the remedy invoked here from the operation of the rule is not without reason. In appeals under this statute, which is designed to afford a summary remedy, the defendant is permitted to retain possession of the premises pending the appeal, upon furnishing a distinct and independent security, in addition to that

afforded by his person and estate. It would seem that a security of this character should be at once available to the creditor, whatever the course taken as between the debtor's body and his estate, and whatever temporary effect be given it in other proceedings against the debtor. We see no reason why the creditor should not be permitted to follow both the debtor and his surety until he obtains a real satisfaction

Judgment affirmed.

IMPRISONMENT FOR DEBT.—This subject will be found fully discussed in the extended notes to *State v. Brewer*, 37 Am. St. Rep. 758-765, and *Eikenberry v. Edwards*, 56 Am. Rep. 363-367.

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ACCOUNTS.

1. **AN ACCOUNT STATED** is an account balanced and rendered, with an assent to the balance, express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance. (Comer v. Way, 93.)

2. **ACCOUNTS—VERIFICATION OF, BY AFFIDAVIT.**—The statute of Alabama authorizes an open, but not a stated, account, to be verified by the affidavit of a competent witness. (Comer v. Way, 93.)

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ACTIONS.

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ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—PRESUMPTION.**—The law presumes possession unexplained to be adverse possession. (Alexander v. Gibbon, 757.)

2. **ADVERSE POSSESSION.—THE POSSESSION** of a tenant is not adverse. (Alexander v. Gibbon, 757.)

3. **COTENANCY.—THE POSSESSION** of one tenant in common is the possession of all. (Alexander v. Gibbon, 757.)

4. ADVERSE POSSESSION—TACKING POSSESSIONS.—In proving title by adverse possession, the period of occupancy by the ancestor and the heir respectively should be added together. (*Alexander v. Gibbon*, 757.)

See Real Property, 1.

AFFIDAVITS.

AFFIDAVITS—SUFFICIENCY OF CERTIFICATE TO JURAT—NOTARIAL SEAL.—A certificate to the jurat of an affidavit, made out of the state, by one who attaches to his name the letters, "N. P.," is not self-proving. A notarial seal, conforming to the requirements of the statute, is indispensable. (*Bayonne Knife Co. v. Umbenhauer*, 114.)

AGENCY.

1. AGENCY, WHEN EXISTS, IS A QUESTION FOR THE JURY.—The testimony of a witness that he acted as the agent of one of the parties to a transaction is not conclusive. The jury may be justified from all the circumstances in finding that he was the agent of the other party, rather than of the one he claims to represent, as where, though he claims to be the agent of the borrower, and not of the lender, he was charged with the duty of examining the property offered as security, reporting the result of his examination to the lender, and afterward of examining the records to see whether the lien of the mortgage was perfect. (*State v. Bristol Sav. Bank*, 141.)

2. FALSE IMPRISONMENT—LIABILITY OF PRINCIPAL FOR ACT OF AGENT.—An express order for an unlawful arrest by an agent is not necessary to fix the liability of his principal, when the arrest is procured by such agent, acting within the scope of his authority, though contrary to instructions. (*Eichengreen v. Railroad*, 833.)

3. DAMAGES—MEASURE OF AGAINST PRINCIPAL.—A principal, whether a corporation or a private person, though liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. (*Warner v. Southern Pac. Co.*, 327.)

See Corporations, 13; Factors; Fraud, 6, 7; Insurance, 15-17.

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See Marriage and Divorce, 3, 4.

AMENDMENT.

See Attachment, 4; Execution, 1.

ANIMALS.

1. ANIMALS, CARE TO BE EXERCISED OVER.—Though a statute imposes a penalty on the owner of every stallion over two years of age found running at large, and makes him liable for all damages done by it, he is not required to exercise more care to prevent its escape than a prudent man would exercise under similar circumstances to prevent animals of the kind mentioned from running at large, taking into consideration their natural habits and propensities, and is, therefore, not liable if it escapes from his control while he is so in the exercise of such care, and inflicts injury before he knows of its escape. (*Briscoe v. Alfrey*, 203.)

2. ACCIDENT, LIABILITY FOR.—No one is liable for an inevitable accident. Hence, if the statute makes the owner of every animal of a designated class running at large liable for a specified penalty, and also for all damages done by it, he is not liable if he

keeps it in a strong inclosure, out of which it breaks in the night without his knowledge, and thereafter kills another animal belonging to the plaintiff in the action. (*Briscoe v. Alfrey*, 203.)

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APPEAL.

1. PRACTICE ON APPEAL.—If a bill of exceptions does not purport to set out all the evidence, the appellate court cannot reverse the finding of the trial court. (*Krebs Mfg. Co. v. Brown*, 188.)

2. APPEAL—ASSIGNMENT OF ERROR—NO CAUSE OF ACTION—DEMURRER.—It may be urged on appeal that no cause of action is stated, although such defect is not specifically assigned by demurrer. (*Tate v. Bates*, 719.)

3. APPEAL—INDEFINITE ASSIGNMENT OF ERROR.—An appellate court will decline to consider an uncertain and indefinite assignment of error. It should specify the particular error complained of, especially where the judgment entry and bill of exceptions are not consistent. An assignment that the court erred in not granting one of three motions is too indefinite to be considered. (*National Fertilizer Co. v. Holland*, 101.)

4. APPELLATE PRACTICE.—OBJECTIONS TO CERTAIN PARTS OF DEPOSITIONS, not identified further than by a reference to certain lines of the originals, cannot be considered on appeal for want of means of identifying the objectionable parts in the transcript. (*Henry v. Hall*, 22.)

5. APPEAL—ADMISSION OF ILLEGAL EVIDENCE.—If the court, without a jury, determines the issue, the rule is, that if there are no errors in the exclusion of evidence, and the legal evidence received authorized the conclusion, although there may have been illegal evidence admitted, the conclusion reached must be sustained. (*Bayonne Knife Co. v. Umbenhauer*, 114.)

6. APPELLATE PRACTICE—EXCLUSION OF EVIDENCE.—A general exception to the entire ruling of the trial court in granting a motion to exclude testimony in general including both legal and illegal evidence, is not ground for a reversal of the judgment. (*Henry v. Hall*, 22.)

7. TRIAL—VERDICT—SUFFICIENCY OF EVIDENCE.—If there is sufficient conflict in the evidence to put the determination of the issue within the province of the jury, the verdict cannot be disturbed on appeal on the ground of the insufficiency of the evidence to sustain it. (*Warner v. Southern Pac. Co.*, 327.)

8. APPEAL—UNPREJUDICIAL ERROR.—A refusal to submit interrogatories to the jury is not reversible error when the verdict and judgment are right and the party complaining is not prejudiced by such refusal. (*Board of Commrs. v. Nichols*, 528.)

9. JUDGMENTS, REVERSAL, RECOVERY OF MONEYS PAID TO SATISFY.—If money is voluntarily paid in satisfaction of a judgment which is subsequently reversed, it cannot be recovered if the person to whom it was paid is in equity and good conscience entitled to it. So held where the reversal of the judgment was due to a mistake in the procedure. (*Teasdale v. Stoller*, 703.)

10. APPEAL—WAIVER OF REPLICATION.—If a case is tried without a replication to a plea, as if it had been properly interposed, the defendant will be treated, on appeal, as having waived it. Hence, if a factor, who has sold cotton for his principal, sues the latter for money due upon an account stated, and the principal pleads that the

sale was unauthorized, and the case is tried without a replication setting up a ratification of the sale, evidence of its ratification being received without objection by the defendant, the principal will be held, on appeal, to have waived such replication. (*Comer v. Way*, 93.)

See Instructions.

APPEARANCE.

See Jurisdiction, 3.

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See Agency, 2; Railroads, 9.

ARSON.

1. **ARSON—BURNING ONE'S OWN HOUSE.**—A person cannot be convicted of arson in setting fire to and burning his own house, of which he is the occupant, even though the burning is with intent to destroy the buildings of others. (*People v. De Winton*, 357.)

2. **ARSON — INDICTMENT — OWNERSHIP.**—An indictment charging arson must allege that the building burned was at least the qualified property of, or in the possession or occupancy of, another than the accused. (*People v. De Winton*, 357.)

3. **ARSON — INDICTMENT — IDENTITY OF NAME—PRESUMPTION.**—If an indictment charges the accused with arson in burning the house of a person of the same name as himself, identity of person is presumed from identity of name, and the indictment must be construed as charging the accused with burning his own house. (*People v. De Winton*, 357.)

ASSESSMENTS.

See Corporations, 6, 8; Judgments, 6; Liens.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. **AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS DOES NOT TAKE EFFECT UNTIL** its execution, so as to cut off intervening liens or securities created after the assignor's disclosure of his purpose in making the assignment, but before its actual execution. (*Pollak v. Muscogee Mfg. Co.*, 165.)

2. **GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS, PURPORTING** to be subject to specific attachments against the property of the assignor, does not preclude the assignees from showing that the recited attachments had no existence or validity. (*Pollak v. Muscogee Mfg. Co.*, 165.)

3. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**—If property is pledged, and attachments are procured to be levied by an insolvent debtor in contemplation of a general assignment by him for the benefit of creditors, and in pursuance of an agreement thereby to create preferences, such attachments and pledges must be treated as part of the general scheme to make an assignment, and the validity of the assignment is preserved, and the property pledged and attached will be held by the assignees for the benefit of all creditors. (*Barrett v. Pollak Co.*, 172.)

4. **IF AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS ATTEMPTS TO MAKE UNLAWFUL PREFERENCES,** they will be disregarded, and the assignment held valid. (*Barrett v. Pollak Co.*, 172.)

5. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—ATTEMPT TO CREATE PREFERENCES.—If an insolvent debtor about to make an assignment for the benefit of creditors, for the purpose of giving a preference, procures some of them to take out and levy attachments against him to immediately precede the filing of his assignment, and gives others certain collateral securities, such attachments and pledges may be held to constitute part of the general assignment, and cannot prevent the equal distribution of the property among all the creditors. (*Pollak v. Muscogee Mfg. Co.*, 165.)

6. ASSIGNMENT FOR THE BENEFIT OF CREDITORS, BILL BY CREDITORS TO ENFORCE OR ENJOIN ACTS OF A SHERIFF AND OTHERS.—If an assignment has been made by an insolvent debtor for the benefit of his creditors, some of them cannot maintain a bill against alleged attachment creditors to prevent their wrongful intermeddling, nor against the sheriff to compel him to pay over the proceeds of sales under attachments, where it is not shown that the assignees may not obtain the necessary redress, nor that they have been requested to do so. (*Pollak v. Muscogee Mfg. Co.*, 165.)

7. IF AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS MADE BY THE ASSIGNOR WITH THE FRAUDULENT PURPOSE of reacquiring the ownership and possession of the property assigned, which purpose has been subsequently carried out by various acts after the assignment has been executed, the assignment is nevertheless valid, unless the assignee at the time of accepting it, or the general creditors provided for therein, knew of, or participated in, the fraudulent intent. A secret fraudulent intent on the part of an assignor cannot defeat his general assignment for the benefit of creditors. (*Barrett v. Pollak Co.*, 172.)

ASSOCIATIONS.

ASSOCIATIONS—WITHHOLDING BOOKS CONTAINING EVIDENCE—RESOLUTIONS AS TO CONTRACT.—No organization, or the members thereof, can, in a suit upon a contract made by it, or them, with other persons, or the public, withhold evidence of the contract on the ground that it is a secret order, and that the production of the books, which contain the evidence, will expose its secrets; nor can such organization, or persons, determine the legal effect of its resolutions, pertaining to the matter of the contract. (*National Fertilizer Co. v. Holland*, 101.)

See Building and Loan Associations.

ATTACHMENT.

1. ATTACHMENT IN AN ACTION ON A JUDGMENT.—A judgment is a contract for the direct payment of money within the meaning of the attachment laws. Hence an attachment may properly issue in an action thereon. (*Meyer v. Brooks*, 790.)

2. AN ATTACHMENT IS NOT VOID BECAUSE THE BOND given for its issue is for a smaller sum than is required by the statute. (*Griffith v. Milwaukee Harvester Co.*, 573.)

3. ATTACHMENT—OTHER SECURITY.—A motion to discharge an attachment on the ground that the plaintiff has other security will not be granted where the suit is brought upon a judgment foreclosing a mortgage, and the affidavit states that the debt sued on is not secured by any mortgage, lien, or pledge of real or personal property, and it appears that some payment has been made on the judgment. It will be presumed that such payment arose

from the sale of the mortgaged premises, and exhausted the plaintiff's security. (*Meyer v. Brooks*, 790.)

4. ATTACHMENT.—AN AMENDMENT OF A COMPLAINT which does not change the cause of action asserted in the original, but merely sets it forth with greater detail, does not dissolve the attachment. (*Meyer v. Brooks*, 790.)

See Assignment for the Benefit of Creditors, 2, 3, 5, 6; Joint Liability, 4, 13; Sales, 10.

ATTORNEY AND CLIENT.

1. AN ATTORNEY MAY BE DISBARRED OR SUSPENDED upon his conviction of the publication of a libel as the managing editor of a newspaper, if the statute authorizes such disbarment upon his being convicted of a misdemeanor involving moral turpitude. Such conviction is conclusive evidence against him. (*Ex parte Mason*, 772.)

2. ATTORNEYS—EXAMINING RECORDS OF CONVICTION OF.—In a proceeding for the disbarment of an attorney because he has been convicted of the publication of a libel, the court may go behind the record for the purpose of determining upon the extent or severity of the punishment to be administered. If it appears from such record that he has suffered the penalty attached to the conviction, and that he was probably not cognizant of the libel until after the paper in which it was issued had been published and circulated, he being the managing editor and not the writer of the libelous article, the court may, instead of disbarring, merely suspend him for a time designated. (*Ex parte Mason*, 772.)

3. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—If an attorney is acting as agent for both parties to a negotiation, or if they are negotiating with each other in the presence of the attorney of one of them, the communications made in the presence of all of the parties are not privileged as between themselves, and the attorney may be compelled by either to testify thereto, in a suit between them growing out of such negotiations. (*Murphy v. Waterhouse*, 365.)

See Executors and Administrators, 8.

BAILMENT.

See Trover, 2, 3.

BANKS.

1. BANKING—LEGISLATIVE RIGHT TO REGULATE.—The business of a banker is affected with a public interest like that of an innkeeper or common carrier, and is, therefore, subject to legislative regulation. The right to engage in that business may be restrained by the sovereign authority and regulated by the legislature and it must be carried on in strict accordance with such statutes as have been enacted for its regulation. (*Meadowcroft v. People*, 447.)

2. NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENTS OF RENEWAL NOTES—NEGLIGENCE.—A bank cannot be charged with negligence in not comparing the forged signature of an indorser on a renewal note with the true signature of the indorser on the original note to it, unless, in so doing, it is guilty of actual bad faith. (*Lyn-donville Nat. Bank v. Fletcher*, 874.)

3. NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENT OF RENEWAL NOTE—ESTOPPEL.—If a bank takes a renewal note with a forged indorsement, and gives up as paid the one with a genuine indorsement, the bank is not estopped, as against the indorser, from

maintaining suit on the genuine note by the rule that when one of two innocent parties must suffer from a mistake, the one making the mistake must bear the loss. (*Lyndonville Nat. Bank v. Fletcher*, 874.)

4. NEGOTIABLE INSTRUMENTS—FORGED INDORSEMENT OF RENEWAL NOTE—ESTOPPEL.—If a bank takes a renewal note with a forged indorsement, and gives up as paid the one with a genuine indorsement, the bank is not estopped, as against the indorser, from maintaining suit upon the original note by the fact that it stamped such note paid instead of renewed. (*Lyndonville Nat. Bank v. Fletcher*, 874.)

5. NEGOTIABLE INSTRUMENTS—RESTRICTED INDORSEMENT—COLLECTION—RIGHT TO PROCEEDS.—If a bank receives for collection only a draft containing an indorsement directing payment to the forwarding bank "for account of the owner" of the draft, the collecting bank cannot, after the insolvency of the forwarding bank with or without notice thereof, apply the amount of the draft to a debt due from the forwarding bank, for the reason that such restricted indorsement is notice of the ownership of a third person, and that the draft is no longer negotiable regardless of any agreement between the forwarding bank and the owner. Such application of the proceeds of the draft is a misappropriation, which renders the collecting bank liable to the owner for the amount of the draft. (*People's Bank v. Jefferson County Sav. Bank*, 59.)

6. NEGOTIABLE INSTRUMENTS—RESTRICTED INDORSEMENT—EFFECT ON COLLECTING BANK.—A bank which collects money upon a draft sent to it by the bank to which it was indorsed for collection by the owner with a restricted indorsement, holds it in trust for the owner, and has no authority to apply it to the indebtedness due from the forwarding bank, and this without reference to notice of its insolvency, and irrespective of any agreement between it and the collecting bank. (*People's Bank v. Jefferson County Sav. Bank*, 59.)

7. BANKS—LIABILITY OF DIRECTORS FOR GROSS NEGLIGENCE.—Bank directors are liable for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it is, in fact, insolvent. (*Solomon v. Bates*, 725.)

8. BANKING.—IT IS CRIMINAL NEGLIGENCE for a banker not to know of his own insolvency. (*Meadowcroft v. People*, 447.)

9. BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSITS, NEW AND OLD.—If the directors of an insolvent bank make false and fraudulent statements to a state treasurer as to its condition, in order to conceal its insolvency, and thereby induce him not only to make new deposits of public funds, but also to permit a part of the funds deposited by his predecessor in office to remain, they are liable in case of loss for all of the deposits, both new and old. (*Tate v. Bates*, 719.)

10. BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT.—NO CAUSE OF ACTION is stated against the directors of an insolvent bank, sued for the loss of a deposit occasioned by their fraud, negligence, and mismanagement, by averments that the vice-president permitted the president and cashier to borrow from the bank large sums of money "upon inadequate security," and that such loans were fraudulently suppressed and not included in the official reports of the condition of the bank, if there is no allegation that the loans were lost, or cannot be collected, or that their loss caused the insolvency of the bank, or in any wise injuriously affected the plaintiff. (*Tate v. Bates*, 719.)

11. BANKS—INSOLVENCY—DIRECTORS—LIABILITY—PRESUMPTION—FRAUD.—The directors of a bank are conclusively

presumed to know its condition. It is their duty to know whether it is insolvent, and it is fraudulent in them to put forth official statements that the bank is solvent when they do not know it to be true; and they are, therefore, liable to those who are deceived thereby into having dealings with the bank, or making deposits therein for losses sustained. (*Tate v. Bates*, 719.)

12. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT.**—One who has lost his deposit in a bank through the negligence, fraud, or deceit of its directors may maintain an action against them therefor, especially where it is admitted by demurrer that payment has been demanded of the bank, and that it is wholly insolvent. (*Solomon v. Bates*, 725.)

13. **BANKS—LIABILITY OF DIRECTORS FOR FALSE STATEMENTS.**—The directors of a bank are personally liable for a loss caused to a depositor by their false statements of the condition of the bank, published by their authority, when they knew them to be false, or might, with reasonable care, have known it. They are liable when they did not know the statements to be true, as well as when they knew them to be false, as it was their duty to know that they were true. (*Solomon v. Bates*, 725.)

14. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT WITHOUT APPLICATION TO BANK OR RECEIVER TO SUE.**—One who has lost his deposit in a bank through the negligence, fraud, or deceit of its directors may maintain an action against them therefor without first applying to the bank or its receiver to bring such action, and showing a refusal on the part of the bank or its receiver to sue. (*Solomon v. Bates*, 725.)

15. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—JOINDER OF CAUSES.**—A cause of action against the directors of a bank for the loss of a deposit occasioned by their fraud, neglect, and mismanagement necessarily lies in tort, as the depositor's contract was with the corporation and not with the directors; but, even if it is *ex contractu*, it may be joined with causes of action for fraud and deceit, as all of the causes of action "arose out of the same subject matter." (*Tate v. Bates*, 719.)

16. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—MISJOINDER OF CAUSES OF ACTION.**—In an action against bank directors individually, a cause of action for negligence in the discharge of their duties, whereby the plaintiff lost his deposit in the bank, being one for a tort, may be properly united with causes of action for other torts, namely, the fraud and deceit of the directors in making false statements and misrepresentations as to the condition of the bank, whereby the plaintiff was induced to deposit his money therein, which was lost. There is no misjoinder, even if the cause of action for negligence were *ex contractu*, as there is the same "subject of action" throughout all the causes of action, which is the plaintiff's loss of his deposit. (*Solomon v. Bates*, 725.)

17. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—AVERMENT AS TO KNOWLEDGE OF INSOLVENCY.**—An averment in a complaint against the directors of an insolvent bank for the loss of a deposit occasioned by their fraud, neglect, and mismanagement, that the defendants "willfully and fraudulently made false and misleading statements of the condition of the bank, and declared and paid dividends" when the earnings did not justify it, "to conceal the true condition of the bank" and "to induce the public to make deposits therein," sufficiently charges that the defendants "knew or believed that the bank was insolvent," without a direct statement to that effect. (*Tate v. Bates*, 719.)

18. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—DECEIT—PLEADING.**—It is not necessary, in charging

deceit against the president and directors of an insolvent bank, whereby the plaintiff lost his deposit in the bank, to allege that, when the plaintiff made his deposit, the defendants knew or believed he would not get it back, or intended by deceit to obtain it from him, and to cause him to lose it. It is sufficient to allege that the bank, being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends, with a view to conceal its insolvent condition and to procure deposits, and that the plaintiff, being deceived thereby, made the deposit which he seeks to recover. (*Solomon v. Bates*, 725.)

19. **BANKS—LIABILITY OF DIRECTORS FOR LOSS OF DEPOSIT—PLEADING—PARTIES.**—The directors of a bank are jointly and severally liable for the loss of a deposit occasioned by their fraud, neglect, or deceit, without an averment, by the plaintiff, of any conspiracy or common purpose among them to cause such loss; and the bank itself may be joined, or not, as a party defendant, at plaintiff's election. (*Solomon v. Bates*, 725.)

20. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—PARTIES PLAINTIFF.**—A single depositor may, in his own name, maintain an action against the directors of an insolvent bank for the loss of a deposit occasioned by their fraud, neglect, or mismanagement. (*Tate v. Bates*, 719.)

21. **BANKS—ACTION AGAINST DIRECTORS FOR LOSS OF DEPOSIT—PARTIES DEFENDANT—PLEADING.**—If the directors of an insolvent bank are sued for the loss of a deposit occasioned by their fraud, neglect, and mismanagement, neither the bank nor its receiver is a necessary party, and the plaintiff need not allege that the bank or its receiver had been requested to bring the action, and had refused to do it. (*Tate v. Bates*, 719.)

22. **BANKS—LIABILITY OF PRESIDENT AND VICE PRESIDENT FOR LOSS OF DEPOSIT.**—The liability of the president and vice-president of a bank for the loss of a deposit occasioned by the negligence, fraud, or deceit of the directors, is the same as that of the directors. (*Solomon v. Bates*, 725.)

See Checks; Criminal Law, 3; Embezzlement, 1; Indictment, 3, 4; Statutes, 4, 5; Suretyship, 4-6.

BILLS OF LADING.

COMMON LAW, WHEN NOT ABROGATED BY STATUTES—BILLS OF LADING.—A statute providing that the indorsement and delivery of bills of lading shall pass title to the property represented thereby does not restrict the mode of transfer, and such transfer may, therefore, be accomplished by the delivery of such bills of lading for valuable consideration without indorsement. (*Scharff v. Meyer*, 672.)

See Sales, 2, 4.

BONDS.

See Attachment, 2; Municipal Corporations, 1, 2.

BOOKS.

See Associations; Evidence, 1, 13-15.

BOYCOTT.

See Checks, 2.

BREACH OF PROMISE.

See Marriage and Divorce, 1, 2.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—RIGHT TO RECOVER LOAN, INTEREST, AND PREMIUM.—If a mortgage given to secure a loan from a building and loan association provides that on default the association may elect to foreclose, not only for the loan with interest, but also for a "premium" bid by the borrower for the loan, a court of equity cannot decree for both the loan with interest and such premium. Such decree would be tantamount to enforcing a penalty for a breach of contract. (*Roberts v. American Building etc. Assn.*, 309.)

2. BUILDING AND LOAN ASSOCIATIONS—APPLICATION OF LAPSED STOCK PAYMENTS.—A stockholder in a building and loan association is not entitled to apply lapsed stock payments as a credit upon his loan from the association. (*Pioneer Sav. etc. Co. v. Cannon*, 858.)

3. BUILDING AND LOAN ASSOCIATIONS.—THE RULE FOR COMPUTING THE AMOUNT DUE from a defaulting member on a loan from a building and loan association is to ascertain the amount of stated dues and interest which will become due during the future existence of the corporation as estimated, then find the principal, which, with interest for the supposed time, will amount to the dues and interest already calculated; and this will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale. (*Roberts v. American Building etc. Assn.*, 309.)

4. BUILDING AND LOAN ASSOCIATIONS—FINES AS LIQUIDATED DAMAGES.—Fines imposed on members of building and loan associations by its by-laws for failure to make monthly payments, are treated as liquidated damages, fixed by the consent of the parties, to indemnify the association for the loss it has sustained by reason of the failure of the defaulting member to make prompt payments. Fines so imposed are enforced, provided the by-law creating them is reasonable. (*Roberts v. American Building etc. Assn.*, 309.)

5. BUILDING AND LOAN ASSOCIATIONS.—FINES FOR NONPAYMENT OF DUES are essential to the exercise of the express powers conferred upon building and loan associations in their incorporation, and they have a right to impose them whether any express warrant is found for it in the statute of incorporation or not. They have such power by implication, but when not fixed by statute, such fines must be prescribed by the charter or by-laws of the association in precise and unequivocal terms, so as to be readily understood by members, and they must be reasonable, or they cannot be enforced. (*Roberts v. American Building etc. Assn.*, 309.)

BURDEN OF PROOF.

See Real Property, 8.

CARRIERS.

1. CARRIERS—DEVIATION FROM ORIGINAL ROUTE.—If goods can be properly cared for and held until the shipper can be communicated with, the carrier is not justified in deviating from the original route and selecting another, because of a strike, without notice to, and instructions from, the shipper. (*Louisville etc. R. R. Co. v. Odil*, 820.)

2. CARRIERS—DEVIATION FROM ORIGINAL ROUTE.—A carrier who, without justification, deviates from the original route and selects another, for the transportation of goods, is liable for losses

resulting, even from inevitable casualties, and becomes, in effect, an insurer for the line he selects. The shipper's right to recover of him is not waived by an effort made at his instance to recover from the carrier selected by him. (*Louisville etc. R. R. Co. v. Odil*, 820.)

3. **CARRIERS—SALE OF GOODS EN ROUTE.**—A carrier is liable for the loss arising from a sale of perishable goods en route and obstructed by a strike, if they are sold without notice to the shipper, and instructions from him, if notice could have been given and instructions obtained, without inconvenience to the carrier, or delay endangering the safety of the goods. (*Louisville etc. R. R. Co. v. Odil*, 820.)

4. **CARRIERS, LIMITING LIABILITY OF.**—By the common law, a carrier may, by special contract, limit its liability as an insurer, but it cannot restrict it so as to excuse itself from loss or damages resulting from the negligence of its servants or agents. Hence, if a carrier of livestock allows the timbers of a bridge constituting a part of its road to become rotten, resulting in the breaking of a bridge and the delay of a train, it cannot escape liability for such delay by a stipulation in its contract of affreightment. (*Hudson v. Northern Pac. Ry. Co.*, 550.)

See Railroads, 1-8; Sales, 4, 5.

CERTIFICATES.

See Corporations, 7, 8.

CHALLENGES.

See Trial, 2.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGES—RETENTION OF POSSESSION WITH POWER TO SELL.**—A chattel mortgage of stallions, kept for breeding purposes, providing that the mortgagor may retain possession of the horses until default and may sell any or all of them, "the proceeds of such sale to be applied in payment of said [mortgage] notes" is inoperative and void as to other creditors of the mortgagor. (*Richardson v. Jones*, 594.)

2. **CHATTEL MORTGAGE ON UNPLANTED CROP—NATURE AND EFFECT OF.**—A mortgage on an unplanted crop does not pass to the mortgagee a legal title to the crop as it may be planted, or as it may come into existence; but, in a court of equity, it operates by way of present contract, taking effect and attaching to the crop when, and as soon as, it comes in esse, creating a right the court will enforce against all others than bona fide purchasers for value. (*Patapsco Guano Company v. Ballard*, 131.)

3. **CHATTEL MORTGAGE—UNPLANTED CROP—EQUITABLE OWNERSHIP.**—As soon as an unplanted crop, or other thing mortgaged, comes into existence, the vendor, or his assignee with notice, becomes a trustee holding the legal title for the benefit of the mortgagee, and whenever this equitable ownership or interest exists, the courts will interfere for its protection. (*Patapsco Guano Co. v. Ballard*, 131.)

4. **CHATTEL MORTGAGE—UNPLANTED CROP—RIGHT OF TRIAL TO PROPERTY.**—A mortgagee of an unplanted crop may as soon as the crop comes into existence, and under a statute providing that "the right of trial to property shall include any person who holds a lien upon, or equitable title to, such property," try his right to it at law, as though he had the legal title. (*Patapsco Guano Co. v. Ballard*, 131.)

5. CHATTEL MORTGAGE—UNPLANTED CROP—WHEN LEGAL TITLE IS COMPLETE.—When the property covered by a mortgage on an unplanted crop comes into existence and is delivered to the mortgagee, his legal title to it becomes complete, and he may maintain trespass, trover, or detinue against anyone who disturbs his possession; or if, before it is delivered to him, the mortgagor or his assignee, with knowledge of the mortgage lien, receives and disposes of it, either or both are liable in case to the mortgagee for the value of the property disposed of. (*Patapsco Guano Co. v. Ballard*, 131.)

6. CHATTEL MORTGAGE ON UNPLANTED CROP, PRIORITY OF LIEN—RIGHTS OF UNSECURED CREDITORS—INSOLVENT ESTATE.—If a person mortgages to a bank the crops to be grown on his land during a certain year, for a large amount, and transfers to the bank, by such mortgage, all his claims for rents and advances during that year, and his widow, as administratrix, after her husband's death during such year, collects the rent and advances, and pays the amount thereof to the bank, on its mortgage lien, unsecured creditors have no right to the proceeds of the crops under lien for such rents and advances, until the bank's prior right is satisfied; and, if the amount collected and paid over is not sufficient to discharge the mortgage debt, they are, of course, not injured. The fact that the estate is insolvent, and that advances made by the mortgagor to his tenants were purchased by him from a merchant, who advanced them on the mortgagor's credit, does not give the creditors any right to such proceeds. (*Patapsco Guano Co. v. Ballard*, 131.)

7. MORTGAGES—SATISFACTION.—If a chattel mortgage is paid off and canceled, this is sufficient to remove the encumbrance without an entry of record of satisfaction of the mortgage. (*German etc. Ins. Co. v. Humphrey*, 297.)

CHEATING.

See Criminal Law, 2.

CHECKS.

1. CHECKS—NECESSITY OF ACCEPTANCE BEFORE ACTION.—The holder of a check cannot maintain an action against the bank upon which it is drawn until after its acceptance by that bank. (*Commercial Nat. Bank v. First Nat. Bank*, 753.)

2. CHECKS—STIPULATION RESTRICTING PRESENTMENT—RESTRAINT OF TRADE—BOYCOTT.—A stipulation stamped on the face of a check that it will positively not be paid to a certain company or its agents, if made for the purpose of preventing the drawer's transactions, and the nature and extent of his business, from becoming known to a rival house by his checks passing through that channel, is not an unreasonable restriction of trade, or a boycott, where there is no evidence of a conspiracy to injure the agency named. (*Commercial Nat. Bank v. First Nat. Bank*, 753.)

3. CHECKS—STIPULATION RESTRICTING PRESENTMENT BY CERTAIN AGENCIES.—A stipulation stamped on the face of a check that it will positively not be paid to a certain company or its agents is a valid restriction; and the drawer cannot be sued thereon until the check has been presented to the drawee by some other agency, and payment refused. (*Commercial Nat. Bank v. First Nat. Bank*, 753.)

CLAIMS.

See Counties.

COLLATERAL ATTACK.

See Estoppel, 6; Insolvency; Judgments, 10-12.

COLLATERAL SECURITY.

See Assignment for the Benefit of Creditors, 3.

COMMISSIONERS.

See Counties, 1, 2.

COMMON LAW.

LAWS OF ANOTHER STATE—PRESUMPTION.—In a state having no statutes upon a given subject, the common law will be presumed to be in force respecting it. (*Hudson v. Northern Pac. Ry. Co.*, 550.)

See Carriers, 4.

COMMON SOURCE OF TITLE.

See Estoppel, 2.

COMPETENCY.

See Witnesses, 1-4.

CONFLICT OF LAWS.

CONFLICT OF LAWS.—If a contract is made in a state, to be partly performed there, its validity is to be determined by the laws of that state. (*Hudson v. Northern Pac. Ry. Co.*, 550.)

CONSIDERATION.

See Contracts, 1, 16, 17; Trusts, 1.

CONSTITUTIONS.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—SALE OF EDITOR'S TALENTS.—A constitutional guaranty of freedom of the press does not restrict the right to sell anything of value, such as the creature of an editor's brain, provided society is not made to suffer by the transaction. (*Cowan v. Fairbrother*, 733.)

CONSTITUTIONAL LAW.

See Statutes, 1-6.

CONTRACTS.

1. **CONTRACTS—CONSIDERATION.—MARRIAGE** is a valuable consideration and the highest known to the law. (*Nowack v. Berger*, 663.)

2. **CONTRACTS—LAW GOVERNING, AS TO TIME.**—The rights of parties are governed by the law in force at the time when the transactions between them took place. (*Curry v. American etc. Mortgage Co.*, 105.)

3. **STATUTE OF FRAUDS.**—A contract to manufacture iron-work upon a special order and according to a particular design, and not such as is manufactured for the general trade in the ordinary course of the manufacturer's business, is not within the statute of frauds. (*Hientz v. Burkhard*, 777.)

4. **STATUTE OF FRAUDS.**—Though a parol antenuptial contract is invalid when made solely in consideration of marriage, such contract may stand if, in addition to its marital portion, it has another feature, the performance of which may be reckoned a part performance, provided there is reliance on such additional feature, and it is sought to be made the basis for specific relief. (*Nowack v. Berger*, 663.)

5. STATUTE OF FRAUDS.—Contracts in consideration of marriage are not void by the statutes of Missouri, though those statutes prohibit any action from being brought thereon. (*Nowack v. Berger*, 663.)

6. STATUTE OF FRAUDS—ORIGINAL CONTRACT.—If there is no primary liability of a third person to the promisee which continues after the promise is made, it is an original promise and need not be in writing. (*Kilbride v. Moss*, 361.)

7. GUARANTY—STATUTE OF FRAUDS—VERBAL CONTRACT, WHEN ORIGINAL.—If a person is induced to purchase stock in a corporation by the request and verbal promise of a stockholder therein, that he will return to the purchaser the money paid for the stock if it shall become worthless, such promise is an original contract, not required to be in writing, and which binds the promisor personally. Such promise is not a verbal contract of guaranty, nor to answer for the debt, default, nor miscarriage of another. (*Kilbride v. Moss*, 361.)

8. STATUTE OF FRAUDS—CONTRACT, WHEN INDIVISIBLE.—A contract which respects both real and personal property as a contract to dispose or not to dispose of it by will is indivisible, and, if void under the statute of frauds because it affects real property, is also void as to personal property. (*Dicken v. McKinley*, 471.)

9. STATUTE OF FRAUDS, AGREEMENT NOT TO MAKE A WILL.—An agreement by a grandmother, in consideration of her being permitted to adopt her grandchild, not to make any provision in her will depriving the child of any share in her estate, such estate consisting of both real and personal property, is within the statute of frauds, and, if oral, cannot be enforced. (*Dicken v. McKinley*, 471.)

10. STATUTE OF FRAUDS—PART PERFORMANCE.—MARRIAGE is not, as between the parties, such part performance as to take a contract out of the statute of frauds, but, if followed by cohabitation, the courts of Missouri are inclined, in favor of the wife, to regard it as a part performance, or, at least, as entitling her to specific performance of a parol promise made before the marriage by her intended husband. (*Nowack v. Bergen*, 663.)

11. STATUTE OF FRAUDS, PART PERFORMANCE.—THE ADOPTION OF A CHILD and the permitting it to be adopted and its residing with the adopting person for six months before the death of the latter are not such acts of part performance as take out of the statute of frauds an oral agreement not to disinherit such child. (*Dicken v. McKinley*, 471.)

12. CONTRACTS TO PAY LEGAL LIABILITIES differ from contracts of indemnity in this, that upon the latter action cannot be maintained and recovery had until the liability is discharged, while upon the former the action is complete when the liability attaches. (*American Employers' Ins. Co. v. Fordyce*, 305.)

13. WILL, AGREEMENT TO MAKE.—One may make a valid agreement to dispose of his property in a particular way by will, and such agreement may be enforced in equity after his decease against his heirs, devisees, or personal representatives. Such a contract is, however, looked upon with suspicion, and is only sustained when established by the clearest and strongest evidence. (*Dicken v. McKinley*, 471.)

14. A CONTRACT IN RESTRAINT OF TRADE IS REASONABLE if it offers only a fair protection to the interests of the party in whose favor it is made, without being so large in its operation as to interfere with the interests of the public. (*McCurry v. Gibson*, 177.)

15. WHILE CONTRACTS IN GENERAL RESTRAINT OF TRADE are against public policy and void, those in partial restraint, if founded upon a valuable consideration and reasonable in their operation, are valid. (*McCurry v. Gibson*, 177.)

16. TRADE, RESTRAINT OF.—THE ADEQUACY OF THE CONSIDERATION for a contract not to pursue a calling in a designated place will not be considered by a court called upon to enforce such contract. (*McCurry v. Gibson*, 177.)

17. TRADE, CONSIDERATION FOR AGREEMENT IN RESTRAINT OF.—The purchase by one party of the property and goodwill of the business of another furnishes a sufficient consideration for an agreement of the latter not to compete in the conduct of the business so purchased. (*McCurry v. Gibson*, 177.)

18. TRADE, CONTRACTS IN RESTRAINT OF.—It is not sufficient answer to a suit to enjoin a violation of a contract not to practice medicine in competition with the complainant that when the contract was entered into, he was not authorized to practice in the place designated therein. (*McCurry v. Gibson*, 177.)

19. CONTRACTS TO FORBEAR FROM COMPETITION—CHANGE OF LAW.—The older cases attempting to fix arbitrary geographical bounds beyond which a contract to forbear from competition would not be enforced, have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed. (*Cowan v. Fairbrother*, 733.)

20. CONTRACTS—RESTRAINT OF TRADE.—A SALE OF THE RIGHT TO COMPETE in a particular business or calling is valid and enforceable, if the rights of the public are not affected by restraining trade. (*Cowan v. Fairbrother*, 733.)

21. CONTRACTS IN RESTRAINT OF TRADE—ENFORCEMENT—INJUNCTION.—Such contracts in restraint of trade as are valid may be enforced in equity, like other contracts, and breaches of them will be restrained by injunction, on the ground that no other remedy is adequate. (*Cowan v. Fairbrother*, 733.)

22. TRADE, RESTRAINT OF.—THE CONTRACTS OF PROFESSIONAL MEN, SUCH AS PHYSICIANS, not to practice their profession in competition with others pursuing the same calling in a particular place and for a time designated, are valid. (*McCurry v. Gibson*, 177.)

23. CONTRACT NOT TO PRINT NEWSPAPER, VALIDITY OF—RESTRAINT OF TRADE—INJUNCTION.—The sale of a newspaper, by its editor and owner, with a covenant, on his part, not to edit, print, conduct, or be in any manner connected with, a newspaper published within the state for a specified period, is a contract not affecting the public, and is not invalid as being in restraint of trade, or as being in contravention of a constitutional provision guaranteeing the freedom of the press. The breach of such a contract may be restrained by injunction. (*Cowan v. Fairbrother*, 733.)

24. A CONTRACT BETWEEN TWO PARTIES MAY BE ENFORCED BY A THIRD when entered into for his benefit, though he is not named therein and was not privy to the consideration. It is sufficient that the promisee owes to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim. (*St. Louis v. Von Phul*, 695.)

25. CONTRACTS PAYABLE IN SPECIFIC ARTICLES—DEFAULT.—REINSTATEMENT.—If a contract is payable in specific articles as ordered, failure to fill an order makes the contract payable in cash, and the mere acceptance of another order in the course of business does not reinstate the contract. (*Smith v. Coolidge*, 902.)

26. CONTRACTS—PAYABLE IN SPECIFIC ARTICLES—BREACH.—If a contract payable in specific articles has been broken, and has become payable in money, the creditor cannot thereafter accept part payment in goods at his pleasure, and still require that further payments be made in money. (*Smith v. Coolidge*, 902.)

27. PLEADING NEGATING A LAWFUL CONTRACT.—Where the facts necessary to entitle a party to relief are stated, illegality is not presumed, and, if it exists, should be pleaded as a defense in the answer. A person suing to enjoin the violation of a contract not to practice medicine as a competitor need not, therefore, allege that he was authorized or licensed to practice in the place covered by the contracts. (*McCurry v. Gibson*, 177.)

28. PLEADING—ATTEMPT TO SHOW THAT PLAINTIFF IS ENGAGED IN AN ILLEGAL BUSINESS.—If a defendant, against whom an injunction is sought to prevent his practicing his profession as a physician in the same place with the complainant, relies upon the defense that the latter is illegally practicing his profession, the defendant must show facts from which this conclusion must necessarily follow. It is not sufficient to state that the complainant did not file a certificate of his qualification in the county, if, under some circumstances, such filing is unnecessary. (*McCurry v. Gibson*, 177.)

See Associations; Damages, 4; Injunctions, 5-7.

CONTRIBUTION.

See Definitions, 1; Joint Liability, 9, 12-15.

CONVERSION.

See Corporations, 8, 17; Sunday; Trover, 2.

CORPORATIONS.

1. A CORPORATION WHOSE EXISTENCE HAS EXPIRED BY THE TERMS OF THE LAW creating it is not a *de facto* corporation, and a conveyance purporting to be made by it is void. (*Bradley v. Reppell*, 685.)

2. THERE CANNOT BE A CORPORATION DE FACTO where there cannot be a corporation *de jure*, at least, as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its existence. (*Bradley v. Reppell*, 685.)

3. CORPORATIONS—VOTING STOCK BY PROXY.—At common law, stockholders of corporations could not vote by proxy, but it is now otherwise. (*Harvey v. Linville Imp. Co.*, 749.)

4. CORPORATIONS—STOCK—SURRENDER OF VOTING POWER.—Each stockholder in a corporation must be left free to cast his vote, either in person or by proxy, as he deems best for the welfare of the corporation, as the other stockholders are entitled to the benefit of his free exercise of judgment. Hence, any combination or device by which a number of stockholders combine to place the voting of their shares in the irrevocable power of another is contrary to public policy and voidable. (*Harvey v. Linville Imp. Co.*, 749.)

5. CORPORATIONS—STOCK—DELEGATION OF POWER TO VOTE.—The power to vote stock in a corporation is inherently annexed to, and inseparable from, the real ownership of each share, and can only be delegated by proxy with power of revocation. (*Harvey v. Linville Imp. Co.*, 749.)

6. CORPORATIONS—LIEN UPON STOCK FOR DELINQUENT ASSESSMENT—TRANSFERS DURING DELINQUENCY.

A corporation has no lien upon certificates of stock on account of delinquent assessments. The lien is upon the shares alone; and the corporation has no power to prevent a transfer of such certificates, although the shares remain subject to such lien and the new owner takes subject thereto without affecting the identity of the stock; and the corporation may enforce its delinquent assessment upon the shares regardless of the number of transfers made subsequent to the assessment. (*Craig v. Hesperia Land Co.*, 316.)

7. CORPORATIONS—NEGOTIABILITY OF CERTIFICATES OF STOCK—TRANSFER SUBJECT TO EQUITIES.—A certificate of stock in a corporation is non-negotiable, and a purchaser thereof takes subject to all equities in favor of the corporation, regardless of want of notice of such equities. (*Craig v. Hesperia Land etc. Co.*, 316.)

8. CORPORATIONS—CONVERSION OF STOCK—REFUSAL TO TRANSFER.—A corporation refusing to transfer its stock to a purchaser and to issue a new certificate therefor is liable for conversion. The fact of delinquent assessments against such stock is no defense, though proof of them is admissible as affecting the value of the stock sued on. (*Craig v. Hesperia Land etc. Co.*, 316.)

9. PLEDGE — CORPORATE STOCK — TRANSFER—INJUNCTION.—A pledgee of corporate stock, when the contract is silent upon the subject, has no right to have the pledged stock transferred on the books of the corporation into his own name before the maturity of the debt, and an injunction may properly issue to prevent such transfer. (*Spreckels v. Nevada Bank*, 348.)

10. PLEDGE—CORPORATE STOCK—RIGHTS OF PLEDGEE. Transfer upon the books of the corporation is not essential to the validity of a pledge of its stock. Hence, the pledgee is not entitled to a transfer of such stock into his name before the maturity of the debt, nor is he entitled to the surrender and cancellation of the pledged certificate and the issuance of a new one in his name, but he is entitled to have a proper entry of the transaction between himself and the pledgor made upon the books of the corporation for his protection against purchasers or other third persons. (*Spreckels v. Nevada Bank*, 348.)

11. CORPORATIONS—AUTHORITY OF OFFICERS.—The president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper, unless such authority is expressly conferred. Such power is not to be presumed simply from the fact that it has been exercised. (*City Electric etc. Ry. Co. v. First Nat. etc. Bank*, 282.)

12. CORPORATIONS—POWER OF OFFICERS—LIABILITY OF CORPORATION.—A corporation is liable on negotiable paper issued by its president and secretary only when express power has been conferred upon them to issue it, or when they have habitually issued it, or when their act in issuing it has been ratified by the corporation, or when the latter has received a benefit from the transaction. (*City Electric etc. Ry. Co. v. First Nat. etc. Bank*, 282.)

13. CORPORATIONS—POWERS OF OFFICERS.—If the statute expressly confers the management of the affairs of a business corporation upon "not less than three directors," the president and secretary are not general agents. Their powers are delegated and special. (*City Electric etc. Ry. Co. v. First Nat. etc. Bank*, 282.)

14. CORPORATIONS—LIABILITY OF OFFICER FOR PROFITS RECEIVED—BURDEN OF PROOF.—If, after a corporation has entered into a contract for the performance of which its treasurer is authorized to pay out its money, he enters into a secret and fraudulent agreement by which he is to derive a profit from the performance of the

contract, the corporation may elect to treat it as void, and hold him for the whole amount paid out thereunder, and to avoid liability the burden of proof is on him to show that he has paid out only what the work was reasonably worth, and not to exceed its actual cost. (Rutland Electric Light Co. v. Bates, 904.)

15. CORPORATIONS—POWER TO COMPEL OFFICER TO ACCOUNT FOR PROFITS.—A corporation may, upon discovering the fact, compel one of its officers or directors to account for any profit or commission he has made upon a corporation contract. (Rutland Electric Light Co. v. Bates, 904.)

16. CORPORATIONS—POWER TO COMPEL OFFICER TO ACCOUNT FOR COMMISSIONS RECEIVED.—An officer in a corporation who, in making a contract for it, secretly and fraudulently makes an arrangement by which he and two other directors in the corporation are to receive a commission out of the transaction, is liable to the corporation for all of the commissions so arranged for and received. (Rutland Electric Light Co. v. Bates, 904.)

17. CORPORATIONS—CONVERSION BY OFFICER.—If an officer in a corporation takes notes payable to it for its capital stock, which is never issued, and upon ceasing to be an officer in the corporation he refuses to surrender the notes, on the ground that they are lost and are not the property of the corporation, he is guilty of conversion, and must account to the corporation for their value, but he is then entitled to control the stock for which the notes are given. (Rutland Electric Light Co. v. Bates, 904.)

18. CORPORATIONS.—A CREDITOR OF A CORPORATION IS NOT ENTITLED to the benefit of a statute respecting pledges of its choses in action, enacted for the protection of stockholders. (Barrett v. Pollak Co., 172.)

19. CORPORATIONS — INSOLVENCY — PREFERENCES.—The mere insolvency of a corporation does not render its assets a trust fund in its hands for the benefit of its creditors in the strict sense of that term, so as to prevent it from giving a preference to one or more of its creditors to the exclusion of others. (O'Bear Jewelry Co. v. Volfer, 31.)

20. CORPORATIONS — INSOLVENCY — PREFERENCES — EQUITY JURISDICTION.—The property of an insolvent corporation is not a trust fund or estate, accurately speaking, so as to prevent it from making preferences among its creditors in any sense other than that when a chancery court takes possession and control of such property upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be administered for the equal benefit of the corporation creditors. (O'Bear Jewelry Co. v. Volfer, 31.)

21. AN INSOLVENT CORPORATION DOES NOT HOLD ITS PROPERTY AS A TRUST FUND for the benefit of its creditors. (Barrett v. Pollak Co., 172.)

22. THE INSOLVENCY OF A CORPORATION DOES NOT INGRAFT A TRUST upon its property in favor of its creditors. (Pollak v. Muscogee Mfg. Co., 165.)

23. A FOREIGN CORPORATION IS GUILTY OF DOING BUSINESS WITHIN THE STATE if it makes a single loan to a resident thereof, and takes therefor promissory notes secured by a mortgage upon real property situate within the state, though such notes are payable in the state wherein the corporation has its residence. (State v. Bristol Sav. Bank, 141.)

24. CORPORATIONS — FOREIGN — RIGHT TO PURCHASE LANDS.—If a foreign corporation has made a loan and taken a trust deed as security therefor, prior to the passage of a statute requiring

it to file its charter with the secretary of state, and an abstract thereof in the county where land, which it seeks to purchase or acquire is situated, its right to foreclose its trust deed and become the purchaser of the land at a trustee's sale is not affected by such statute. (*Pioneer Sav. etc. Co. v. Cannon*, 858.)

25. FOREIGN CORPORATIONS, CONTRACT OF, WHEN NOT VOID.—Though foreign corporations doing business in the state, except after complying with certain regulations designated in statutes, are subjected to certain penalties, and they and their agents are guilty of a misdemeanor, a contract of insurance effected by them is not void. (*State etc. Ins. Assn. v. Brinkley Stave etc. Co.*, 191.)

26. JUDGMENTS.—A MISTAKE IN STATING THE NAME OF A CORPORATION PLAINTIFF in the title in the complaint does not vitiate a judgment, where such name is correctly stated in the body of the complaint, in the original notice, and in the writ of attachment. (*Griffith v. Milwaukee Harvester Co.*, 573.)

27. CORPORATIONS, DISSOLUTION OF.—Upon the expiration of the term of the corporate existence as fixed by law or its charter, it becomes ipso facto dissolved, and can no longer act in a corporate capacity, and its title to property ceases. (*Bradley v. Reppell*, 685.)

28. CORPORATION, DISSOLUTION, JUDICIAL DETERMINATION OF, WHEN NOT NECESSARY.—If the term of the corporate existence, as stated by a general law or in its charter, has expired, no judicial investigation or determination of that fact is required, and acts subsequently purporting to be done by it may be collaterally assailed on the ground that it did not exist. (*Bradley v. Reppell*, 685.)

See Injunctions, 4; Master and Servant, 2.

COSTS.

See Executors and Administrators, 11.

COTENANCY.

See Adverse Possession, 3; Partition.

COUNTERCLAIM.

See Setoff

COUNTIES.

1. COUNTIES --COMMISSIONERS--MINISTERIAL ACTS.—The act of a board of county commissioners, in hearing and either allowing or rejecting a claim against the county, is ministerial and not judicial. (*Board of Commrs. v. Nichols*, 528.)

2. COUNTIES—ACTS OF COMMISSIONERS.—The object of a statute requiring a claim against a county to be first filed and presented to its board of commissioners for allowance before bringing suit thereon is to give it an opportunity to discharge its legal obligations without the expense of a lawsuit. (*Board of Commrs. v. Nichols*, 528.)

3. JUDGMENTS—RES JUDICATA.—REJECTION OF A CLAIM by a board of county commissioners for injuries sustained by reason of a defective county bridge is not an adjudication of the matter so to bar an action therefor in a court of competent jurisdiction. (*Board of Commrs. v. Nichols*, 528.)

COURTS.

1. COURTS OF PROBATE—JURISDICTION.—A probate court has no jurisdiction of a claim against an estate for services ren-

dered by an attorney employed by the administrator to prosecute a suit in the interest of such estate. (*Pike v. Thomas*, 292.)

2. **COURTS—CONTROL OVER PROCESS.**—Although a court of law has complete control over its process to prevent abuse and injustice, yet circumstances may arise in the execution of such process which render it incompetent to administer full relief to the party seeking its aid, or to protect from injustice and injury the rights of others which have intervened. In such cases, resort must be had to equity. (*Anniston Pipe Works v. Williams*, 51.)

3. **COURTS—PRECEDENTS.**—A court should always rely upon a substantial reason or a fundamental principle rather than upon an ill-considered precedent. (*Springer v. Shavender*, 708.)

COVENANTS.

See Husband and Wife, 11.

CREDITORS' SUIT.

1. **CREDITOR'S BILL, PREFERENCE GAINED BY.**—If a creditor files his bill to set aside an assignment for fraud, carrying on the contest successfully and at his own expense, another creditor cannot then intervene and compel the sharing with him of the property recovered. The creditor who first files his bill obtains thereby a priority entitling him to be paid out of the proceeds of the assets, if there are no valid prior liens. (*Senter v. Williams*, 200.)

2. **CREDITOR'S BILL—CREDITORS BECOMING PARTIES AFTER A DECISION.**—A creditor who delays asking to be admitted as a complainant until the cause has been finally heard and a finding has been made in favor of the original complainant, and the alleged fraudulent conveyance directed to be set aside, will not be admitted as a party, but his claim will be postponed until the complainant's claim has been satisfied. (*Senter v. Williams*, 200.)

CRIMINAL LAW.

1. **CRIMINAL LAW—PROSECUTION AS BAR.**—A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. (*State v. Emery*, 878.)

2. **CHEATING AND SWINDLING.**—If a twenty-dollar gold piece is intrusted to one ignorant of its value for the purpose of going to market to buy a specific article, worth only twenty-five cents, and the seller, perceiving that the purchaser believes the coin to be a silver dollar, encourages that belief by his persuasive silence and equivocal assent, retains the coin, and returns only seventy-five cents in change, the latter, having used "deceitful means" and employed an "artful practice," is guilty of being a common cheat and swindler. (*Jones v. State*, 433.)

3. **BANKING—OFFER AT A CRIMINAL TRIAL TO REPAY LOST DEPOSIT.**—If a banker is prosecuted for receiving moneys on deposit while insolvent, whereby such deposit shall be lost to the depositor, he is not entitled to an acquittal upon tendering on the trial to the depositor the amount of his deposit, if, in the mean time, the banker had suspended business because of his insolvency. The crime being once consummated, the right of the state to the conviction of the criminal cannot be taken away by his act. (*Meadowcroft v. People*, 447.)

4. **LARCENY—AGREEMENT NOT TO PROSECUTE.**—An agreement between the prosecution and one charged with several larcenies, that if he pleads guilty to one charge he shall not be prosecuted upon those remaining, may be enforced by the court. (*State v. Emery*, 878.)

See Arson; Embezzlement; Incest; Larceny; Trial, 5, 6.

CROPS.

See Chattel Mortgages, 26.

CROSS-ACTIONS.

See Replevin.

CROSSINGS.

See Railroads, 13, 14.

CUSTOM.

See Evidence, 4.

DAMAGES.

1. **DAMAGES, WHEN ARE NOT REMOTE AND SPECULATIVE.**—If one undertaking to put a window in a storehouse in first-class order does his work so negligently and unskillfully that the rain comes in through the window, damaging articles stored in the house, he is liable for the injury thus occasioned. It is the direct and proximate result of his default. (*Krebs Mfg. Co. v. Brown*, 188.)

2. **THE DAMAGES FOR DELAY IN THE TRANSPORTATION** of cattle is the difference in their market value at the place of destination on the day when they were actually delivered there and the day when they ought to have been delivered. (*Hudson v. Northern Pac. Ry. Co.*, 550.)

3. **DAMAGES, WHEN LIQUIDATED.**—If one agrees not to practice his calling in a designated place, and that if he does so he will pay a sum designated as a forfeiture, such sum is to be deemed liquidated damages, rather than as a penalty. (*McCurry v. Gibson*, 177.)

4. **DAMAGES.—MEASURE OF DAMAGES FOR BREACH OF CONTRACT** by a natural gas company to supply a glass factory starting into a new business in the vicinity with sufficient fuel to operate for a certain period is the expense, necessarily incurred in establishing the factory and in the unsuccessful attempt to operate it together with the fair rental value of the idle factory, if it has any, and, if not, then interest on the money invested, together with interest on any idle working capital which could not be used by reason of the violation of the contract, and, if men skilled in the manufacture of glass had to be brought from a distance, the cost of their transportation and the compensation which the glass company had agreed, and was required, to pay for the necessary services of its officers, may be treated as part of the necessary expenses of the attempted operation for which the gas company is liable, but the prospective profits of the glass business embrace too many elements of uncertainty to form a just basis for measuring the damages sustained by reason of the breach of the contract. (*Paola Gas Co. v. Paola Glass Co.*, 598.)

5. **NEGLIGENCE—INJURY TO PROPERTY.—MEASURE OF DAMAGES** for negligent injury to, or destruction of, a building, is the amount necessary to restore the property to its former condition, or, in other words, to replace the building by another of equal value, taking the age and depreciation in value of the former into consideration. (*Anderson v. Miller*, 812.)

6. **THE MEASURE OF DAMAGES** for property injured is generally the difference between its value before and after the injury. (*Krebs Mfg. Co. v. Brown*, 188.)

See Agency; Building and Loan Associations, 4; Insurance, 22; Master and Servant, 3; Railroads, 8; Trover, 6, 7.

DEBTOR AND CREDITOR.

1. **MARSHALING SECURITIES — CREDITORS HAVING TWO FUNDS OR LIENS.**—If goods have been transferred to a creditor by the delivery of bills of lading representing them, and thereafter they are attached by another creditor of the transferor, the former, though he has other securities, cannot be compelled to exhaust them before resorting to the goods. These circumstances do not present a case of two persons having a lien on the same property, and one of them having another security, also, for, because of the transfer before the levy of the attachment, the property never became subject to the attachment lien. (*Scharff v. Meyer*, 672.)

2. **DEBTOR AND CREDITOR—IMPRISONMENT OF DEBTOR—SUSPENSION OF REMEDIES.**—The confinement of a debtor in jail on execution does not suspend collateral remedies to enforce satisfaction of the debt. (*Sheeran v. Sparhawk*, 909.)

3. **DEBTOR AND CREDITOR—IMPRISONMENT OF DEBTOR—SUSPENSION OF REMEDIES—RIGHT TO PURSUE SURETY.**—The imprisonment of a debtor on execution does not suspend the right of the creditor to maintain an action for the satisfaction of the debt against such debtor's surety on his appeal bond. The latter remedy is collateral. (*Sheeran v. Sparhawk*, 909.)

See Chattel Mortgages, 6; Creditor's Suit.

DECEIT.

See Fraud; Banks.

DECLARATIONS.

See Evidence, 5.

DEEDS.

See Husband and Wife, 11.

DEFAULT.

See Judgments, 9.

DEFINITIONS.

Account stated. (*Comer v. Way*, 93.)

"Chance of advantage." (*Miller v. Life Ins. Co.*, 741.)

Homestead *ex vi termini*. (*Turner v. Turner*, 110.)

DEFINITIONS — CONTRIBUTION.—**INDEMNITY** springs from contract, express or implied, and is the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. Contribution is not contractual; it is an equity founded in acknowledged principles of natural justice. (*Vandiver v. Pollak*, 118.)

Jurisdiction. (*Springer v. Shavender*, 708.)

DEFINITION — "LOOSE AND IMMODEST WOMAN."—A "loose woman," or a "woman of loose and immodest character" is an unchaste and sexually impure woman in the ordinary signification of such terms. (*Foster v. Hanchett*, 886.)

Police Power. (*Meadowcroft v. People*, 447.)

DELIVERY.

See Bills of Lading; Sales.

DEPOSITIONS.

1. **MOTIONS—SUPPRESSION OF DEPOSITIONS.**—The mere announcement of the parties that they are ready for trial is not such

an entering on the trial as to preclude a party from making a motion to suppress a deposition. (National Fertilizer Co. v. Holland, 101.)

2. DEPOSITIONS—MAY BE SUPPRESSED, WHEN.—It is proper for the court to suppress a deposition, taken by interrogatories, if the opposite party has not been served with written notice as prescribed by the code, and had the statutory time within which to file cross-interrogatories, even where the motion to suppress is not made until after the parties have announced themselves ready for trial. (National Fertilizer Co. v. Holland, 101.)

See Appeal, 4.

DETINUE.

See Chattel Mortgages, 6

DEVIATION.

See Carriers, 1, 2.

DEVISE.

See Trusts, 2.

DIRECTORS.

See Banks, 7, 9-21.

DISBARMENT.

See Attorney and Client, 1, 2.

DISSOLUTION.

See Attachment, 4; Corporations, 27, 28.

DIVORCE.

See Marriage and Divorce.

DOMICILE.

1. CHILD, DOMICILE OF.—A CHANGE in the domicile of a child may be effected by its grandparents with whom it is residing after the death of its parents. (In re Benton, 546.)

2. A CHILD ACQUIRES THE DOMICILE of its grandparents and loses that of its parents, when, after their death, it takes up its residence with the former. (In re Benton, 546.)

See Guardian and Ward, 2, 4.

DOWER.

See Husband and Wife, 11.

DRUGS.

See Statutes, 1, 3.

DRUNKENNESS.

See Slander, 2.

DUES.

See Building and Loan Associations, 35.

EJECTMENT.

EJECTMENT—PLEADING—ALLEGATION OF TITLE BY DEFENDANT.—An answer by a defendant in ejectment, by which he alleges title in himself, amounts to a general denial only, and is

not a cross-complaint, requiring denial by the plaintiff. (*Phillips v. Hagart*, 369.)

See Partition, 5.

ELECTRIC COMPANIES.

1. **ELECTRICITY, EVIDENCE OF CAUSE OF ACCIDENT.** If there are a trolley wire and a telephone wire close to each other, the latter of which has sagged and finally fallen to the ground, and the only other wire in the neighborhood is an electric light wire, which is suspended above the telephone wire, and is not shown to have either sagged or come in contact with any other wire, and a child in the street is injured by coming in contact with the telephone wire where it has fallen to the ground, from these facts the jury are warranted in inferring that the latter wire had become charged with a strong current of electricity by coming in contact with the trolley wire. (*City Electric etc. Ry. Co. v. Conery*, 262.)

2. **ELECTRIC CORPORATIONS ARE BOUND TO USE SUCH REASONABLE CARE** in the construction and maintenance of their lines and apparatus as a reasonable man would use under the circumstances, and when their wires carry a dangerous current of electricity, and the result of negligence may be the exposure of persons in the public streets to death or the most dangerous accidents, the highest degree of care is required. (*City Electric etc. Ry. Co. v. Conery*, 262.)

See Railroads, 20.

EMBEZZLEMENT.

1. **AN INDICTMENT CHARGING THAT THE ACCUSED WHILE INSOLVENT** and doing a banking business, did corruptly, willfully, and feloniously receive a deposit from a person not indebted to him, whereby the deposit was lost to such depositor, sufficiently charges the accused with the crime of embezzlement as a banker under the statutes of Illinois. (*Meadowcroft v. People*, 447.)

2. **CRIMINAL PRACTICE—VERDICT OF JURY, WHEN SUFFICIENT.**—It is not necessary for the jury to find the value of the property embezzled, when neither the character of the evidence nor the mode of the punishment is contingent upon such value. Hence, if, under a statute authorizing the conviction of a banker for embezzlement if he has received moneys upon deposit while insolvent, and providing that his punishment shall be a fine of double the amount embezzled, and that, in addition thereto, he may be imprisoned not less than one nor more than three years, a verdict is sufficient which fixes the amount of the fine and the duration of the imprisonment, where the evidence clearly shows that the amount embezzled was more than one-half of the amount of the fine. (*Meadowcroft v. People*, 447.)

See Statutes, 5.

ENTIRETIES.

See Husband and Wife, 2-5.

EQUITY.

1. **WILLS—JURISDICTION OF EQUITY TO PROBATE.**—If exclusive jurisdiction is conferred upon probate courts in respect to wills and the probate thereof, courts of equity have no jurisdiction to establish and carry into effect a destroyed, suppressed or spoliated will. (*Domestic etc. Missionary Society v. Eells*, 888.)

2. **WILLS—JURISDICTION OF EQUITY.**—If jurisdiction over the probate of wills is vested exclusively in courts of probate, a court

of equity may, upon proof of the probate of a will in a court of probate, proceed with the cause in aid of such court, and grant relief to which the plaintiff shows himself entitled, and which the jurisdiction of the probate court is inadequate to give. (*Domestic etc. Missionary Soc. v. Eells*, 888.)

3. WILLS,—JURISDICTION OF EQUITY OVER PROBATE.—AID TO PROBATE COURT.—A court of equity may aid a probate court by preserving property by injunction pending proceedings in the latter court to probate a will; but the fact that the court of equity acquires jurisdiction for such temporary or ancillary relief gives it no jurisdiction over the probate of the will, when such jurisdiction is vested exclusively in probate courts. (*Domestic etc. Missionary Soc. v. Eells*, 888.)

4. EXECUTION SALES—MOTION TO SET ASIDE—EQUITY JURISDICTION.—If, upon a motion in a court of law to set aside an execution sale of land under process issuing therefrom, it appears that the sheriff has executed his deed and the purchaser has taken possession and paid off taxes and other liens which should be refunded or secured to him, the motion cannot be granted, and relief can be obtained only in a court of equity. (*Anniston Pipe Works v. Williams*, 51.)

5. EQUITABLE SALE—EQUITABLE RELIEF.—A court of equity will not relieve a defendant from an execution sale, though the price realized was grossly inadequate and he did not know of the sale when it was made, if he did not know that he had been sued, and that an attachment had issued against his property, and he exercised no diligence to ascertain what had been done in the cause or to make any redemption from the sale. (*Griffith v. Milwaukee Harvester Co.*, 573.)

6. PRACTICE IN EQUITY.—A DEMURRER TO AN ANSWER is unknown to the equity practice. Hence the objection may be made at any stage of the proceedings that new matter pleaded in such answer fails to disclose sufficient matter to bar relief. (*McCurry v. Gibson*, 177.)

See *Building and Loan Associations*, 1; *Courts*, 2; *Judgments*, 13-16; *Mortgages*, 6; *Specific Performance*.

ESTATES OF DECEDENTS.

See *Executors and Administrators*.

ESTOPPEL.

1. ESTOPPELS MUST BE MUTUAL. (*Springer v. Shavender*, 708.)

2. ESTOPEL—COMMON SOURCE OF TITLE.—The rule of estoppel, based upon a common source of title, is not an arbitrary fiction of the law, but is based on sound reasoning and logical deduction. Hence, if two parties claim title from a third person, it is conceded that the latter had the title, and it is unnecessary to prove that he did have it. (*Alexander v. Giddon*, 757.)

3. ESTOPPEL.—MISREPRESENTATION MADE THROUGH MISTAKE or induced by fraud does not create an estoppel. (*Lyn-donville Nat. Bank v. Fletcher*, 874.)

4. ESTOPPEL.—A JUDGMENT DEBTOR IS NOT ESTOPPED from having a sale made under execution set aside because the writ was not under seal by the fact that before the sale he interposed a motion to stay the levy and sale on other grounds, and did not resist a motion made by another judgment debtor to share in the proceeds of the sale, and permitted the sale to be made without objection, where it appeared that such judgment debtor did not know of the

defect in the process at the time of the sale. (*Weaver v. Peasley*, 469.)

5. **ESTOPPEL BY JUDGMENT.**—Nothing but a valid judgment will operate as an estoppel upon any one. (*Springer v. Shavender*, 708.)

6. **ESTOPPEL BY JUDGMENT—COLLATERAL ATTACK.**—A judgment void for want of jurisdiction of the subject matter cannot conclude any person, and may be collaterally attacked. (*Springer v. Shavender*, 708.)

7. **ESTOPPEL BY JUDGMENT THAT LIVE PERSON IS DEAD.**—If administration is granted upon the estate of a living person, supposed to be dead, and there is a decree for the sale of his land, in a proceeding to which all of his children and heirs at law are made parties, and his death is alleged and admitted in the pleadings, the decree does not operate as an estoppel upon the heirs, in a collateral proceeding by them to recover possession from those claiming through the purchaser at the sale, because of the declaration of the court that their ancestor was dead when, in fact, he was alive, and because they did not appeal from that finding, and have it reversed, or institute a direct proceeding to set it aside. The decree is absolutely void, both as to the ancestor and his heirs, for want of power in the court to exercise jurisdiction over the estate of a live man, and, being void, it works no estoppel. (*Springer v. Shavender*, 708.)

See *Banks*, 3, 4; *Insurance*, 3; *Judgments*, 6, 9; *Landlord and Tenant*, 2.

EVIDENCE.

1. **EVIDENCE—COMPELLING PRODUCTION OF BOOKS—ATTACHMENT.**—It is only those who have the custody or control of books sought to be put in evidence that can be required to produce them, and a motion to attach parties who have not the custody of the books, or the authority to produce them, cannot be granted. (*National Fertilizer Co. v. Holland*, 101.)

2. **A PRESUMPTION CANNOT BE BASED UPON ANOTHER PRESUMPTION**, because there is no visible connection between the facts out of which the first presumption arises, and the fact sought to be established by the dependent presumption. (*Globe etc. Ins. Co. v. Gerisch*, 486.)

3. **EVIDENCE, PRESUMPTION AS TO DISTANCE BETWEEN MILEPOSTS.**—There is no presumption that mileposts along the line of a railway were put there by the railway corporation, or that they are a mile apart. They are, therefore, not admissible against it as evidence of the distance between two stations. (*Little Rock etc. Ry. Co. v. Wells*, 216.)

4. **CUSTOM OR USAGE—JUDICIAL NOTICE.**—A custom or usage to be good, and of which judicial notice is taken, must be general, and of such long standing as to have become a part of the law itself. (*City Electric etc. Ry. Co. v. First Nat. etc. Bank*, 282.)

5. **EVIDENCE—DECLARATIONS AS TO RELATIONSHIP.**—Declarations of a person since deceased as to relationship, descent, birth, or marriage, are admissible in evidence when such matters are in controversy, and such declarations concern his family affairs. (*Shorten v. Judd*, 587.)

6. **AN ADMISSION MADE ON THE TRIAL** that the person injured and the person through whose fault he was injured were fellow-servants is a solemn admission made in the course of a judicial proceeding for the purpose of dispensing with evidence or ar-

gument, and precludes all other controversy in conflict with the admission. (*Kansas etc. R. R. Co. v. Fitzhugh*, 211.)

7. EVIDENCE.—STATEMENTS MADE TO A PHYSICIAN SEVERAL HOURS after an accident form no part of the *res gestae*, and therefore are not admissible as evidence against an accident insurance company for the purpose of proving the cause of the injury. (*Globe etc. Ins. Co. v. Gerisch*, 486.)

8. EVIDENCE.—CONTENTS OF LOST LETTER.—The receiver of a letter may testify to its contents after proper preliminary proof that it has been lost, without notice to the writer to produce it. (*Continental Ins. Co. v. Chew*, 506.)

9. EVIDENCE, TO VARY WRITING.—The illegality of a written instrument may be shown by parol evidence. (*Roe v. Kiser*, 288.)

10. EVIDENCE.—INDEPENDENT COLLATERAL AGREEMENT.—The question whether an entire contract was reduced to writing, or an independent collateral agreement was made, is one of fact for the jury, if there is any evidence to sustain such parol agreement. (*Hines v. Willcox*, 823.)

11. EVIDENCE.—INDEPENDENT PAROL AGREEMENT.—In an action by a tenant against his landlord to recover for personal injury received by reason of the dangerous condition of the leased premises, parol evidence that the landlord agreed to put such premises in safe condition before the lease was executed, or that at the time it was executed, the landlord or his agent represented that the premises had been put in safe condition as promised, is admissible if the lease contains only the obligations and undertakings imposed upon the tenant, and nothing in conflict with such independent collateral agreement. (*Hines v. Willcox*, 823.)

12. USURY.—PAROL EVIDENCE IS ADMISSIBLE to prove that a note bearing legal interest was accompanied by a verbal agreement to pay twice that amount of interest and to thus establish the fact that the note is usurious and void. (*Roe v. Kiser*, 288.)

13. A CERTIFICATE OF THE ACKNOWLEDGMENT OF A DEED IS NOT OPEN TO IMPEACHMENT by parol evidence to the effect that the wife did not acknowledge before the notary, and was not by him examined separate and apart from her husband, when she confessedly signed the instrument in the presence of the notary, who was then at her house for the purpose of taking the acknowledgment, and no fraud or duress is shown. (*American etc. Mortgage Co. v. Thornton*, 148.)

14. EVIDENCE.—ACCOUNT BOOKS.—A witness who has not kept the books or payroll of a corporation, and who has no recollection of the facts independently of them, cannot state the contents of such books or payroll. (*Paola Gas. Co. v. Paola Glass Co.*, 598.)

15. CORPORATIONS.—ENTRIES ON BOOKS AS EVIDENCE.—Entries upon the books of a corporation are *prima facie* evidence against it as admissions, and become conclusive when shown to have been duly and correctly made by its recording officer. (*City Electric etc. Ry. Co. v. First Nat. etc. Bank*, 282.)

16. CORPORATIONS.—ENTRIES ON BOOKS AS EVIDENCE.—Corporations are not bound by false and simulated entries upon their records, unless, knowing them to be such, they have neglected to correct them, and some innocent third person, not knowing them to be false, has acted upon his faith in them to his prejudice. (*City Electric etc. Ry. Co. v. First Nat. etc. Bank*, 282.)

17. EVIDENCE OF INJURY THROUGH ACCIDENT, WHAT SUFFICIENT.—Where it is claimed that an injury resulting in the death of the insured consisted of a strain received while carrying a box of ashes and clinders, the jury may be warranted in inferring

that the deceased lifted and carried out such box, if it appears that it was his duty to have done so, that he was in the habit of doing so every evening, that on the evening when he was claimed to have been injured he was seen shoveling ashes and cinders into a wooden box in which he usually carried them, that they were actually carried out by some person on that evening, and that during the same evening he complained of pain in the lower part of the abdomen, which continued to increase until he died, and the physicians attending upon him all testified that his condition was the result of some strain or external violence; but this evidence does not warrant the further presumption that from his carrying out of the box a strain resulted and that this in turn was the cause of his death. (*Globe etc. Ins. Co. v. Gerisch*, 486.)

18. EVIDENCE—MARKET VALUE.—Evidence of the market value of cattle in one place is admissible to prove their value in another, if it is shown that the market value at the former place is controlled by that at the latter, allowing the difference in freight. (*Hudson v. Northern Pac. Ry. Co.*, 550.)

19. EVIDENCE OF PATERNITY—FAMILY RESEMBLANCE.—Evidence of family resemblance by view and comparison of the jury is admissible in proof of parentage, if the child on view has attained an age when its features have assumed some degree of maturity and permanency, or if the putative father is dead, his photograph, proven to be a good likeness of him, is admissible for the purpose of such comparison. (*Shorten v. Judd*, 587.)

20. EVIDENCE—VALUE OF GOODS AT PARTICULAR PLACE.—In determining the value of goods at a particular place, evidence of the value at other places than the place in question is inadmissible, where the evidence is clear that there is a value at that place. (*Comer v. Way*, 93.)

See Appeal, 5, 6; Associations; Attorney and Client, 1; Instructions, 1; Legislature; New Trial, 2; Notaries Public.

EXECUTION.

1. AN EXECUTION NOT UNDER THE SEAL OF THE COURT is void, and cannot be made valid by an amendment after a sale thereunder. Such a sale should be set aside on motion. (*Weaver v. Peasley*, 469.)

2. A HOMESTEAD UNDER THE LAWS OF THE UNITED STATES IS EXEMPT from seizure and sale for the satisfaction of a debt created after final proof was made, but before the issuing of a patent. (*Wallowa Nat. Bank v. Riley*, 794.)

3. SHERIFF'S DEEDS—RECITALS—CONCLUSIVENESS OF.—A recital in a sheriff's deed given to the purchaser at mortgage foreclosure sale that there has been no redemption from the sale, is not conclusive upon the judgment debtor, his grantee or successor in interest, who has made a valid redemption, and the latter may show by collateral attack that such recital is false. (*Phillips v. Hogart*, 369.)

4. EXECUTION SALES—PLACE OF SALE.—If a county has two courthouses, at each of which are situated courts of coequal and co-ordinate powers and jurisdiction, an execution sale of real estate may be made at either courthouse, under a statute providing that such sales must be made at the "courthouse of the county." (*Annis-ton Pipe Works v. Williams*, 51.)

5. EXECUTIONS—SALES EN MASSE.—If two or more distinct parcels of land are to be sold under execution, the officer making the sale must sell them, separately, unless special circumstances are shown making it clear that they will bring more or that the sale

will be more advantageous if they are offered for sale together, and if, in disregard of his duty, the officer sells them in a lump, as one parcel, the sale may be set aside on seasonable application. (*Annis-ton Pipe Works v. Williams*, 51.)

6. EXECUTION SALES.—A MISTAKE IN THE NAME OF THE PLAINTIFF in the execution and notice of sale does not avoid such sale, where the judgment is otherwise correctly described. (*Griffith v. Milwaukee Harvester Co.*, 573.)

7. AN EXECUTION SALE WILL NOT BE SET ASIDE because of inadequacy of price, though very great, where it was made subject to redemption, and the sale was conducted in all respects according to law. (*Griffith v. Milwaukee Harvester Co.*, 573.)

8. EXECUTION SALES—MOTION TO SET ASIDE—TIME.—No inflexible rule as to the time within which a motion to set aside an execution sale must be made can be announced, and its seasonableness must be determined by the circumstances of each particular case. A motion to set aside an execution sale of land made within two years after the sale is seasonably made, if, in the mean time the property has remained unchanged and nothing has occurred prejudicially affecting the relations of the purchasers to it. (*Annis-ton Pipe Works v. Williams*, 51.)

9. EXECUTION SALES—REDEMPTION.—A certificate of redemption from an execution sale is no part of the redemption, and the refusal of the sheriff to issue such certificate to the person redeeming is immaterial. (*Phillips v. Hagart*, 369.)

10. EXECUTION SALES—REDEMPTION—SUCCESSOR IN INTEREST.—The grantee of a judgment debtor whose land has been sold under execution pursuant to foreclosure is a "successor in interest" of the judgment debtor, and not a "redemptioneer" within the meaning of sections 701 and 705, California Code of Civil Procedure, and he is entitled to redeem in the same manner as the judgment debtor. (*Phillips v. Hagart*, 369.)

See Equity, 4, 5; Estoppel, 4.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—POWER TO BIND ESTATE.—An administrator has no power to bind an estate by his individual contracts. (*Pike v. Thomas*, 292.)

2. EXECUTORS AND ADMINISTRATORS—POWER TO RENT—LIABILITY.—Under the statute of Alabama, an executor or administrator may rent the lands of the estate without demanding security for the rent; and, if he acts judiciously in making rents, and for the best interests of the estate, he is not chargeable with what he fails to collect. (*Patapseo Guano Co. v. Ballard*, 131.)

3. EXECUTORS AND ADMINISTRATORS—LIABILITY ON NOTES MADE BY.—An executor or administrator cannot bind the estate which he represents by any promissory note he may make. Such note can only bind him personally. (*Germania Bank v. Michaud*, 653.)

4. EXECUTORS AND ADMINISTRATORS.—NEGOTIABLE PROMISSORY NOTES made by executors or administrators as such, import sufficient consideration to bind them personally. (*Germania Bank v. Michaud*, 653.)

5. EXECUTORS AND ADMINISTRATORS—NOTES BY CONSIDERATION.—A note made by an executor or administrator imports a sufficient consideration to bind him personally when he has assets in his hands which he might have applied in satisfaction of his obligation, or where a consideration for his promise has been received by him. (*Germania Bank v. Michaud*, 653.)

6. EXECUTORS AND ADMINISTRATORS—NOTES OF CONSIDERATION.—A note given by an executor or administrator for the debt of his testator, without any new consideration, and after the time to file claims has expired, and when it has never been allowed or ordered paid by the court, is without consideration. (*Germania Bank v. Michaud*, 653.)

7. EXECUTORS AND ADMINISTRATORS—NOTES OF CONSIDERATION—EXTENSION OF TIME OF PAYMENT.—Although generally an agreement to extend the time of payment of the debt of a third person is a sufficient consideration for a promise to pay that debt, yet such consideration is not sufficiently adequate to bind an administrator, who has signed a note in his official capacity, to pay a debt due by his testator. (*Germania Bank v. Michaud*, 653.)

8. EXECUTORS AND ADMINISTRATORS.—AN ATTORNEY EMPLOYED BY AN ADMINISTRATOR of an estate has no claim against it for his services, although they may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him. (*Pike v. Thomas*, 292.)

9. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES—SERVANTS' WAGES.—Wages due a clerk for services, rendered prior to as well as during, the last illness of his deceased employer are included in the term "wages of servants," used in a statute classifying, and providing for the settlement of claims against the estate of deceased persons. (*Cawood v. Wolfley*, 590.)

10. ADMINISTRATORS—RELATION—INSURANCE.—A grant of letters of administration relates back to the death of the intestate, and validates all acts which come within the scope of an administrator's authority and which were in their nature beneficial to the estate, and therefore validates proofs made by such administrator before his appointment and after the death of the intestate for the purpose of enforcing a policy of insurance. (*Globe Ins. Co. v. Gerisch*, 486.)

11. EXECUTORS AND ADMINISTRATORS—COSTS AS A CHARGE AGAINST ESTATE.—The administratrix of an insolvent estate is not entitled to credit for costs paid by her in a case against a debtor, and compromised by her, without an order of the court. Such costs are not a preferred claim against the estate. (*Patapsco Guano Co. v. Ballard*, 131.)

12. EXECUTORS AND ADMINISTRATORS—IMPROPER CHARGES AGAINST ESTATE.—Debts contracted by the widow in her own name for family supplies, after the date of the death of her husband and her own appointment as his administratrix, are not proper charges against his estate in her favor on the settlement of his insolvent estate by her. (*Patapsco Guano Co. v. Ballard*, 131.)

13. EXECUTORS AND ADMINISTRATORS—DISCHARGE OF ENCUMBRANCES—CREDITS.—When it will promote the interest of an insolvent estate, an administratrix has authority to discharge encumbrances upon the property of the estate. Hence, if there are unencumbered mortgages on land, upon which payments, though small as compared with the value of the land mortgaged, must be made, or the mortgages become liable to foreclosure, and the mortgage debts are scarcely more than half the value of the land, the administratrix, after failing twice to get a bidder upon exposing the land to public sale, owing to the times and circumstances being unpropitious for a sale, may properly rent the land and apply the proceeds received to the relief of the land mortgaged, though a part of it has been set apart to her as exempt, and she should, in the settlement of her accounts, be allowed credit for such application of the rent. (*Patapsco Guano Co. v. Ballard*, 131.)

14. EXECUTORS AND ADMINISTRATORS—PAYMENTS FOR THEIR OWN BENEFIT—CREDITS.—After all the personal property covered by an intestate's mortgage, except a portion thereof which has been set apart to the widow as exempt, has been exhausted in discharge of the mortgage debt, leaving a small balance due, and the widow, as administratrix, afterward pays off this balance for her own benefit, to relieve her exempt property from the mortgage lien, there being no other personal property, she is not entitled to be credited with this payment in the settlement of her account as administratrix. (*Patapsco Guano Co. v. Ballard*, 131.)

15. JURISDICTION—ADMINISTRATION UPON ESTATE OF LIVING PERSON—COLLATERAL ATTACK.—The only jurisdiction a court of probate has, in respect to the administration of estates, is over the estates of dead persons. Hence, administration granted upon the estate of a living person, though he is supposed to be dead, is an absolute nullity, and may be collaterally attacked. The death is a fundamental prerequisite to the exercise of jurisdiction, because, until the death occurs, there is no subject matter. (*Springer v. Shavender*, 708.)

FACTORS.

1. A FACTOR HAS A GENERAL LIEN upon goods consigned to him and the proceeds of their sale for advances and commissions consequent upon their reception, safekeeping, and sale. (*Comer v. Way*, 93.)

2. FACTORS—UNAUTHORIZED SALE AT PLACE NOT CONTEMPLATED—LIABILITY.—If a factor reships goods consigned to him by his principal, without the latter's advice, and they are sold at less than they might have been sold for at the place of shipment, where, in the contemplation of the parties, they were designed to be sold, he is liable for the difference in price for which they were sold and the market value at the place where it was intended that they should be sold. (*Comer v. Way*, 93.)

3. FACTORS—RATIFICATION OF UNAUTHORIZED SALE—MATTER OF LAW.—If a principal is dissatisfied with his factor's sale, and is fully informed of what has been done, he must express his dissatisfaction within a reasonable time, or be held to have ratified the sale. Hence, if the factor, who has made large advances, reships cotton consigned to him by his principal, and makes an unauthorized sale of it at a place other than that at which it was to have been sold, and at a price claimed by him to have been in advance of that which he would have received had the cotton been sold at the place contemplated, and the principal is informed of the transaction by a statement and account of sales, showing that the net proceeds have been placed to his credit, leaving a balance due the factor, the principal's failure for four months thereafter to make any objection to the sale, or to the application of the proceeds to his credit, is, as a matter of law, a ratification of the sale. (*Comer v. Way*, 93.)

FALSE IMPRISONMENT.

See Agency, 2; Railroads, 9.

FALSE REPRESENTATIONS.

See Fraud.

FENCES.

See Real Property, 2-6.

FINES.

See Building and Loan Associations, 3-5.

FIRES.

See Landlord and Tenant, 5, 6.

FORECLOSURE.

See Mortgages, 4-6.

FORFEITURES.

A FORFEITURE WILL BE DEEMED WAIVED by any agreement, declaration, or course of action on the part of him who is benefited by such forfeiture which leads the other party to believe that, by conforming thereto, the forfeiture will not be incurred. (Hudson v. Northern Pac. Ry. Co., 550.)

See Insurance, 5-7, 16, 17.

FORGERY.

See Banks, 2-4; Negotiable Instruments, 5.

FRAUD.

1. FRAUD.—ACTION FOR DECEIT can only be maintained when it is shown that a false representation of a material fact has been fraudulently made with intent to deceive, and in ignorance relied upon, and that damage has resulted therefrom. (Hedin v. Minneapolis, 628.)

2. FRAUD—DECEIT FOR FALSE REPRESENTATIONS.—An action for deceit may be maintained although the parties entered into a contract procured by false representations upon which the action is based. (Hedin v. Minneapolis, 628.)

3. FRAUD—LIABILITY FOR FALSE REPRESENTATIONS.—A false statement of opinion as to a subject on which one party has special knowledge, while the other party is ignorant and relies thereon to his damage, if made fraudulently, renders the person giving the opinion liable in an action for deceit. (Hedin v. Minneapolis, 628.)

4. FRAUD—LIABILITY FOR FALSE REPRESENTATIONS may arise if one has, or assumes to have, knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies. (Hedin v. Minneapolis, 628.)

5. FRAUD.—FALSE REPRESENTATIONS RELIED UPON, TO BE ACTIONABLE, must be as to a material fact susceptible of knowledge, and generally, if they appear to be mere matters of opinion or conjecture, they are not actionable. (Hedin v. Minneapolis, 628.)

6. FRAUD—FALSE REPRESENTATIONS.—An action for deceit lies though defendant made the false representations as agent for another. (Hedin v. Minneapolis, 628.)

7. SALES—FRAUD—PURCHASE BY AGENT FOR UNDISCLOSED PRINCIPAL.—Fraud cannot be inferred from the fact of buying property through an agent who is instructed to take the title in his own name, as an agent's concealment of the fact that he is buying for another is not per se a fraudulent act. (Cowan v. Fairbrother, 733.)

See Assignment for the Benefit of Creditors, 7; Banks, 11-13, 22; Judgments, 17, 18; Sales, 11; Suretyship, 4-6.

FRAUDULENT CONVEYANCES.

A FRAUDULENT TRANSFER PASSES NOTHING AS AGAINST CREDITORS, though good between the parties. (Senter v. Williams, 200.)

FREEDOM OF THE PRESS.

See Constitutions; Contracts, 2, 3.

GIFTS.

See Husband and Wife, 8.

GUARANTY.

1. **GUARANTY IS A COLLATERAL UNDERTAKING** and cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no substantive liability on the part of a third person, either express or implied, that is to say, no debt, default, or miscarriage of another, present or prospective, there can be no contract of guaranty. (*Kilbride v. Moss*, 361.)

2. **NEGOTIABLE INSTRUMENTS—IF PAYMENT OF A NOTE IS GUARANTEED**, the mere neglect of the holder to pursue the maker does not discharge the guarantor. (*Peterson v. Russell*, 634.)

3. **NEGOTIABLE INSTRUMENTS.—A GUARANTY OF THE PAYMENT OF INTEREST** on a promissory note is not a continuing guaranty, and applies only to the interest accruing before the maturity of the note. (*Rector v. McCarthy*, 271.)

See Contracts, 7.

GUARDIAN AND WARD.

1. **NATURAL GUARDIANS OF CHILDREN, WHO ARE.**—Where the parents of a minor are dead, its grandfather or grandmother, when the next of kin is his natural guardian. (*In re Benton*, 546.)

2. **MINORS, JURISDICTION OVER—DOMICILE.**—The courts of the state of the domicile of a child have jurisdiction of the matter of the guardianship of his person. The domicile of the child is to be determined by that of his parent, and, when once fixed, remains until another is lawfully acquired. (*In re Benton*, 546.)

3. **A FOREIGN GUARDIAN** of a nonresident minor is, by the statutes of Iowa, authorized to receive the property of such minor situate in that state on compliance with the conditions prescribed by such statutes. (*In re Benton*, 546.)

4. **A GUARDIANSHIP OF THE PROPERTY OF MINORS** in Iowa will be discontinued, and the property directed to be paid over to the guardian of their person appointed in another state of which they had acquired a domicile through being taken to that state to live with their grandparents after the death of their parents. (*In re Benton*, 54)

HEADLIGHTS.

See Railroads, 15-18.

HEIRS.

See Partition, 2, 3.

HIGHWAYS.

See Judgments, 18.

HOMESTEADS.

1. **HOMESTEAD EX VI TERMINI MEANS** the family seat or mansion. (*Turner v. Turner*, 110.)

2. **HOMESTEAD.—ACTUAL OCCUPANCY** is essential to a valid claim of homestead exemption, under the code of Alabama, except in the single case of the filing of a declaration of claim to a home-

stead exemption in the office of the probate judge, upon leaving the homestead temporarily, or a leasing of the same. (*Turner v. Turner*, 110.)

3. HOMESTEAD DEPENDS UPON WHAT.—Whether a house and lot constitute a homestead depends upon the character of the building and the uses to which it is adapted, and to which it is devoted. (*Turner v. Turner*, 110.)

4. HOMESTEAD—DISCONNECTED HOTEL BUILDING—USE OF RENTS TO SUPPORT FAMILY.—A lot and house thereon, built and used for hotel purposes, and owned by a decedent having a complete home place across the street, in a different square of a city, and in which he resided, cannot be set apart to his widow as a part of his homestead, though rents from the hotel were used by him for the support of his family, as this use of the rents did not constitute such a connected use of the disconnected hotel property, as to impress the latter with the homestead character. (*Turner v. Turner*, 110.)

5. IF A HOMESTEAD IS LAID OFF IN AN ARBITRARY, CAPRICIOUS, AND UNREASONABLE SHAPE, for the purpose of injuring the creditors of the claimant, as where he so selects it as to surround the lands not selected and cut them off from access to the street and render them comparatively valueless, such selection may be set aside, and the claimant given leave to make another. (*Sparks v. Day*, 279.)

6. HOMESTEAD, FORM IN WHICH MAY BE DESIGNATED. One who is permitted to select a homestead cannot be allowed to carve it out of the land in such form as to render the remainder worthless, or to so impair its value that creditors shall be unnecessarily injured. (*Sparks v. Day*, 279.)

7. HOMESTEADS—MORTGAGE BY SURVIVING SPOUSE AFTER SECOND MARRIAGE.—A homestead selected by a husband from his separate property or from the community property vests absolutely in him upon the death of his then wife, and his title thereto is not affected by his remarriage. He has the power to mortgage such homestead without the knowledge, consent, or signature of his second wife, free from any claim by her. (*Dickey v. Gibson*, 321.)

See Execution, 2; Husband and Wife, 11.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR SLANDER BY WIFE.—At common law, a husband is liable in damages for slanderous words uttered by his wife though he is not present, and does not participate in any manner. This rule has not been abrogated by statute in Minnesota. (*Morgan v. Kennedy*, 647.)

2. ENTIRETIES.—A CONVEYANCE OF REAL PROPERTY TO A HUSBAND AND WIFE VESTS TITLE in them as tenants by the entireties. (*Branch v. Polk*, 266.)

3. ENTIRETIES.—A MORTGAGE EXECUTED BY A HUSBAND, and purporting to convey the undivided one-half of a tract of land which he and his wife own as tenants by the entireties, must, upon his death, be utterly inoperative as against his widow. (*Branch v. Polk*, 266.)

4. ENTIRETIES. POWER OF WIFE TO CONVEY OR MORTGAGE HER INTEREST.—Under a law giving to married women the control of their separate property, with power to convey or dispose of it as if unmarried, a wife may convey and mortgage her interest in an estate held by herself and her husband as tenants by the entireties, subject to his right of survivorship. (*Branch v. Polk*, 266.)

5. ENTIRETIES.—IF SEPARATE MORTGAGES ARE EXECUTED by a husband and wife, each purporting to convey the undivided one-half of a tract of land which is vested in them by the entireties, both being to secure the same indebtedness, and the husband subsequently dies, the mortgage by him becomes inoperative, because the whole property vests in her by survivorship; but the mortgage executed by her is enforceable as to the undivided one-half of the property. (*Branch v. Polk*, 266.)

6. HUSBAND AND WIFE—USE OF WIFE'S SEPARATE ESTATE BY HUSBAND—TRUST.—If a husband, with the consent of his wife, uses a part or all of the principal or the proceeds of her separate estate in his business and for the support of the family, he, or his estate, is presumptively liable to the wife therefor as her trustee, in the absence of agreement between them as to whether the advancement is a loan or a gift. (*Haymond v. Bledsoe*, 502.)

7. HUSBAND AND WIFE, APPLICATION OF HER PROPERTY TO THE PAYMENT OF HIS DEBTS.—Where money is loaned to, and services are rendered for, a husband and wife, she cannot avoid a mortgage upon her separate property, given to secure repayment, on the ground that the transaction involved the application of her property to the payment of his debts, the money having been paid to him and the greater part squandered by him or exhausted in the payment of his debts. (*American etc. Mortgage Co. v. Thornton*, 148.)

8. HUSBAND AND WIFE—GIFTS IN FRAUD OF WIFE.—Under the laws of Illinois and Kansas, a married man may, during coverture, in the absence of actual fraud and as against any postmortem claim of his widow, give away to his children the bulk of his property, though the known effect of so doing is to greatly diminish the share which she would have been otherwise entitled to upon his death. (*Small v. Small*, 581.)

9. HUSBAND AND WIFE—LIEN RESERVED TO WIFE IN DEED—MORTGAGE—ESTOPPEL—TORT FEASOR.—Under the married woman's law of Alabama in existence prior to February, 1887, the joinder of a wife in a mortgage by her husband of land conveyed to him by deed, which deed expressly reserved to the wife a prior lien on the land to secure an indebtedness of the grantor to her, operated merely as a relinquishment of her dower and of the homestead, and did not estop her from afterward asserting the superiority of her lien over that of the mortgagee, even where the mortgage contained general covenants of seisin, warranty of title, and against encumbrances; and her repudiation of such covenants was not a fraud which justified dealing with her as a tortfeasor. (*Curry v. American etc. Mortgage Co.*, 105.)

10. HUSBAND AND WIFE—VALIDITY OF MORTGAGE BY WIFE.—Prior to February, 1887, when the new married woman's law of Alabama was enacted, a mortgage made by a married woman in that state, with or without her husband, of her statutory separate estate, except for the purpose of securing purchase money of the land mortgaged, was null and void, inoperative as a conveyance at law, or an estoppel in equity. (*Curry v. American etc. Mortgage Co.*, 105.)

11. HUSBAND AND WIFE—JOINDER OF WIFE IN HUSBAND'S DEED—COVENANTS.—The legal effect of a wife's joining in the deed of her husband is to release her dower and effectuate a valid alienation of the homestead. She is not a covenantor in the covenants of seisin, warranty, and against encumbrances, contained in the instrument. Such covenants proceed from, and bind, the husband alone. (*Curry v. American etc. Mortgage Co.*, 105.)

See Homestead, 7; Mortgages, 4; Witnesses, 1-3.

IMPRISONMENT FOR DEBT.

See Debtor and Creditor, 2; Statute, 6, 7.

INCEST.

1. **INCEST.—THE CONSENT OF BOTH PARTIES** is not essential to the crime of incest, and the defendant may be convicted of that crime, though in making it he employed the force essential to the crime of rape. (Smith v. State, 140.)

2. **ACCOMPLICE—INCEST.**—If the crime of incest is committed through fear or force, the person against whom such fear and force were employed is not an accomplice, and her testimony does not require corroboration. (Smith v. State, 140.)

INCOME.

See Mortgages, 2, 3; Receivers, 2.

INDEMNITY.

See Contracts, 12; Definitions.

INDICTMENT.

1. **AN INDICTMENT STATING AN OFFENSE IN THE TERMS OF THE STATUTE** creating it should be deemed sufficiently technical. (Meadowcroft v. People, 447.)

2. **INDICTMENT, INTENT, CHARGING.**—It is sufficient to charge a crime in the terms of the statute creating it without averring the intent of the accused, unless such intent is by the statute made one of the constituent elements of the evidence. (Meadowcroft v. People, 447.)

3. **INDICTMENT CHARGING THAT MONEYS WERE RECEIVED BY THE ACCUSED AS BANKERS.**—An averment that the accused, being persons then doing a banking business, had received certain moneys of another person not then indebted to them sufficiently states that the accused received such moneys as bankers and as a special bank deposit. (Meadowcroft v. People, 447.)

4. **INDICTMENT AGAINST BANKERS.**—An indictment charging that C. J. M. and F. R. M., persons doing business as bankers under the name of M. & Co., were insolvent, and while so insolvent received a deposit, is not defective in not charging the partnership with being insolvent. (Meadowcroft v. People, 447.)

See Arson, 2, 3; Embezzlement, 1.

INDORSEMENT.

See Banks, 2-6; Bills of Lading; Negotiable Instruments, 1, 2, 5-7.

INFANTS.

See Domicile; Guardian and Ward; Injunctions, 2, 3; Judgments, 12.

INJUNCTIONS.

1. **CONTRACTS—SALE OF RIGHT TO COMPETE—TRANSFER—INJUNCTION.**—The purchaser of a right to compete for popularity as an editor may lawfully sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the buyer will be protected by injunction. (Cowan v. Fairbrother, 733.)

2. **JUDGMENTS—INJUNCTION AGAINST.**—A bill in equity to restrain the enforcement of a judgment against an infant, on the ground that no guardian ad litem was appointed for such infant, is without equity and must be dismissed. (Levystein v. O'Brien, 56.)

3. JUDGMENTS—INJUNCTION AGAINST—INFANCY.—

Equity has no jurisdiction to enjoin a judgment at law for irregularities attending and errors committed by the court in the rendition thereof, unless such irregularities or errors are of such character as to avoid the judgment ipso facto. Merely erroneous and irregular judgments, whether against infants or adults, cannot be enjoined. Void judgments against either can be enjoined. (*Levystein v. O'Brien*, 56.)

4. CORPORATIONS—VOTING STOCK—"POOLS"—PLEDGE—INJUNCTION.—An agreement between stockholders, holding a majority of the shares of a corporation, to "pool" their stock by transferring it to trustees, with full power to vote it, in solido, at corporate meetings, and to pledge it as collateral for money borrowed by the corporation is contrary to public policy and voidable, and the purchasers of such shares may, by injunction, protect his right to vote them. (*Harvey v. Linville Imp. Co.*, 749.)

5. TRADE, RESTRAINT OF.—AN INJUNCTION may issue to compel a physician to comply with his agreement not to practice his profession in a designated place. (*McCurry v. Gibson*, 177.)

6. AN INJUNCTION WILL NOT BE ISSUED to enjoin the violation of an agreement not to engage in business in competition with the complainant, unless it appears that he is engaged in the business, and that it is of some substantial value, nor if in carrying on the business, he must violate some law. (*McCurry v. Gibson*, 177.)

7. INJUNCTION—LIQUIDATED DAMAGES.—Though a party who has agreed not to practice his profession at a designated place stipulates in case he does so to pay a sum specified as a forfeiture, and such sum has by the court been deemed to be liquidated damages, the court is not thereby ousted of its jurisdiction to enjoin a further violation of the agreement. This is especially true where the circumstances show that the contracting parties were not anticipating a violation of the agreement when it was made. (*McCurry v. Gibson*, 177.)

See Contracts, 21, 23, 24; Corporations, 9.

INNKEEPERS.

1. IF A RESTAURANT KEEPER FAILS TO EXERCISE ORDINARY CARE in furnishing food to his patrons, whereby damages result to them, he is answerable, but he is not liable except for want of such care, and a person suing to recover damages for being furnished unwholesome food, through the eating of which he was made ill, must assume the burden of proving carelessness or negligence on the part of the keeper of the restaurant. (*Sheffer v. Willoughby*, 483.)

2. A RESTAURANT KEEPER IS NOT AN INSURER OF THE FOOD furnished to his patrons, and therefore is not liable if they are made sick by eating it, unless he has been guilty of negligence. (*Sheffer v. Willoughby*, 483.)

INSOLVENCY.

JUDGMENTS AGAINST INSOLVENTS—COLLATERAL ATTACK.—A judgment rendered against an insolvent during the pendency of insolvency proceedings by a court of competent jurisdiction cannot be collaterally attacked on the ground that it was rendered in violation of a statute providing that an action pending against a debtor at the time of commencement of insolvency proceedings by him shall, on his application, be stayed to await the determination of insolvency proceedings.

ings on the question of his discharge, unless he unreasonably delays endeavoring to obtain a discharge. (*Wells v. Atkins*, 880.)

See *Banks*, 5, 6-13, 17; *Chattel Mortgages*, 6; *Corporations*, 19-22; *Receivers*, 3, 4.

INSTRUCTIONS.

1. **ACTIONS—INSTRUCTIONS—WEIGHT OF EVIDENCE.**—In a civil case, it is error to instruct the jury that there must be sufficient evidence to "convince their minds" of any fact necessary to be shown. The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case. (*Murphy v. Waterhouse*, 365.)

2. **APPELLATE PROCEDURE.**—An error in an instruction is not a ground for reversal if it was in favor of the party complaining of it. (*Teasdale v. Stoller*, 703.)

3. **INSTRUCTIONS—ERRONEOUS, AS GROUND FOR SETTING ASIDE VERDICT.**—An excessive verdict based on erroneous instructions that the case is one in which punitive or vindictive damages may be awarded must be set aside on appeal. (*Warner v. Southern Pac. Co.*, 327.)

4. **NEW TRIAL—ERRONEOUS INSTRUCTIONS.**—A complicated, involved, and confusing instruction which leaves a jury in doubt as to whether an adverse possession, sufficient to establish title in the possessor, must be thirty or fifty years, is error authorizing a new trial. (*Alexander v. Gibbon*, 757.)

INSURANCE.

1. **INSURANCE, PLACE WHERE DEEMED EFFECTED.**—If a person in this state makes application for insurance to the agent of an insurance corporation whose domicile is in another state, and the application is forwarded to such corporation at its home office, and is there passed upon and accepted, and the policy there signed by the proper officers is forwarded directly to the assured in this state, who thereafter forwarded the premiums to the insurer at its home office, it having no agent in this state authorized to pass upon applications or to issue policies, the contract is not a contract of this state, but of the state wherein the policy was signed and issued, and, if valid there, it is valid here. (*State etc. Ins. Assn. v. Brinkley Stave etc. Co.*, 191.)

2. **INSURANCE—WHEN SEPARATE.**—If a policy provides for a certain amount of insurance on a house, and a distinct amount on its contents, the insured cannot, in case of loss, recover more for the contents than the amount named in the policy. (*Continental Insurance Co. v. Chew*, 506.)

3. **INSURANCE—ESTOPPEL.**—As a party cannot take advantage of his own wrong, an insurer cannot complain of a hardship which has imposed upon himself by his own wrongful act. (*Sourwine v. Supreme Lodge*, 532.)

4. **INSURANCE—FAILURE TO PAY PREMIUM—FORFEITURE.**—A provision in a policy of insurance that the company shall not be liable for any loss occurring while any part of the premium is overdue and unpaid is valid, and is a good defense to an action to recover for a loss happening during the time when such premium is thus overdue and unpaid. (*Continental Ins. Co. v. Chew*, 506.)

5. **INSURANCE—FAILURE TO PAY PREMIUM—FORFEITURE—WAIVER.**—If, under a policy of insurance providing that the company shall not be liable for any loss occurring while any part of the premium is overdue and unpaid, the company, with knowledge of a loss, accepts a premium overdue, it thereby waives the for-

felture and restores the policy to its full force, not only as to the future, but also from the beginning. (Continental Ins. Co. v. Chew, 506.)

6. INSURANCE—WAIVER OF STATUTORY BENEFIT.—A provision in a statute intended for the benefit of an insurer may be waived by him. (Ellis v. Massachusetts etc. Ins. Co., 373.)

7. INSURANCE — ENCUMBRANCES — FORFEITURE.— An encumbrance put upon insured property in violation of the policy of insurance suspends and avoids it, although such encumbrance is paid off before the loss occurs. (German etc. Ins. Co. v. Humphrey, 297.)

8. INSURANCE—LOSS, NOTICE OF.—If an insured, upon the destruction of his property from the peril insured against, notifies the local agent of the insurer, with the request that such agent notify his principal, and the request is complied with, this is a sufficient notice of the loss. (Burlington Ins. Co. v. Lowery, 196.)

9. INSURANCE.—NOTICE OF LOSS IS IMMEDIATE within the meaning of a policy of insurance stipulating for immediate notice when it is given to an agent of the insurer a day or so after the loss occurs, with a request that he notify his principal, and he at once complies with such request. (Burlington Ins. Co. v. Lowery, 196.)

10. INSURANCE, ORAL WAIVERS WHERE WRITTEN ARE STIPULATED FOR.—Proof of loss may be waived orally, though the policy requires waivers to be in writing. (Burlington Ins. Co. v. Lowery, 196.)

11. INSURANCE—WAIVER OF PROOF OF LOSS.—A denial of liability by the general agent of an insurance company when notified of a loss constitutes a waiver, and obviates the necessity of furnishing proofs of loss. (Continental Ins. Co. v. Chew, 506.)

12. INSURANCE, WAIVER OF PROOFS OF LOSS.—If an insurance corporation sends a blank form of proofs of loss after the expiration of the time within which such proof was required by the policy to be made, and thereafter receives without objection the proofs made upon such blank, it waives the failure to make such proof in time. (Burlington Ins. Co. v. Lowery, 196.)

13. INSURANCE, LIMITATION OF TIME WITHIN WHICH TO BRING SUIT, CONSTRUCTION OF.—If a policy of insurance against loss by fire declares that it shall not become payable until sixty days after satisfactory proofs of loss have been received by the insurer, including the award of appraisers, where an award is required, and that no action shall be brought for the recovery of any claim unless commenced within six months next after the fire shall have occurred, the period of six months must be computed from the date of the fire and not from the date when the loss was ascertained and became due and payable. An action commenced seven months after the fire is, therefore, too late. (Egan v. Oakland Ins. Co., 798.)

14. INSURANCE—ERRONEOUS STATEMENTS IN APPLICATION—INSURER, WHEN BOUND BY.—If an insured, who cannot write, makes true answers to an insurance agent who writes the application and has full knowledge of the facts, but who, through misconception of the force and purport of questions, writes incorrect answers without the actual knowledge of the insured, the insurer is bound thereby. (Continental Ins. Co. v. Chew, 506.)

15. INSURANCE—GENERAL AGENT—WAIVER OF PREMIUM.—A general insurance agent, with authority to make terms for insurance, countersign and deliver policies, and collect premiums, has power to waive a condition in a policy requiring pay-

ment of the premium in money. (*American Employers' Ins. Co. v. Fordyce*, 305.)

16. **INSURANCE—POWER OF AGENT TO WAIVE FORFEITURES.**—A clerk of an insurance agent, without authority to make contracts of insurance, or to sign insurance policies, and not in any way held out to the public as having such authority, has no implied power to waive forfeitures of policies. (*German etc. Ins. Co. v. Humphrey*, 297.)

17. **INSURANCE—POWER OF AGENT TO WAIVE FORFEITURE.**—An insurance agent, furnished by his principal with blank applications and with policies, duly signed by the company's officers, and who has been authorized to take risks, to issue policies by simply signing his name, to collect premiums, and to cancel policies, without consulting his principal, is empowered to waive conditions of forfeiture in such policies for encumbrances placed upon the insured property. He may waive such forfeiture by parol, notwithstanding the limitations upon his power contained in the policy. (*German etc. Ins. Co. v. Humphrey*, 297.)

18. **INSURANCE, RIGHT OF INSURED TO CANCEL AND HAVE UNEARNED PREMIUMS RETURNED.**—An insured in a mutual insurance corporation, who is entitled by the terms of his policy to terminate the insurance at any time and to withdraw from the corporation by notice in writing to the secretary on paying all dues, is not at once entitled to unearned premiums on giving notice of his desire to cancel the insurance and to withdraw. The corporation may wait until the anniversary of the policy, if necessary, to enable it to determine for what proportion of the expenses and liabilities the assured is chargeable up to the date of such notice. (*State etc. Ins. Assn. v. Brinkley Stave etc. Co.*, 191.)

19. **INSURANCE—VACANT AND UNOCCUPIED PREMISES, WHAT ARE NOT.**—The fact that a tenant, intending to remove, goes away to meet his wife, leaving two of his children in the house, with instructions to remain there until he returns, and that a small portion of the furniture has been removed, does not constitute a breach of a condition against the premises becoming vacant and unoccupied. (*Burlington Ins. Co. v. Lowery*, 196.)

20. **INSURANCE PAYABLE TO MORTGAGEE, ACTION BY MORTGAGOR.**—If an insurance is effected on property, loss, if any, payable to the mortgagee, he is a necessary party to an action on the policy, though the interest of the mortgagee is less than the amount of the insurance. (*Burlington Ins. Co. v. Lowery*, 196.)

21. **CONTRACTS—RESCISSION OF SETTLEMENT.**—An insured, after accepting a sum of money in settlement of a disputed loss, cannot rescind such settlement on the ground that it was procured by fraud, without first returning the money received. (*Harkey v. Mechanics' etc. Ins. Co.*, 295.)

22. **INSURANCE AGAINST LIABILITY.**—A policy of insurance, by which the insurer expressly binds himself to pay all damages with which the insured may be legally charged or required to pay, or for which he may become legally liable, is not only a contract of indemnity, but also a contract to pay liabilities, and a recovery may be had thereon as soon as the liability attaches to the insured and before it is discharged. The measure of damages is the amount of the accrued liability. (*American Employers' etc. Ins. Co. v. Fordyce*, 305.)

23. **PLEADING—INSURANCE AGAINST FRAUD OR DISHONESTY OF EMPLOYEE—FATAL VARIANCE BETWEEN ALLEGATA AND PROBATA—NONSUIT.**—If the contract, whereby a fidelity and casualty company insures a bank against the default of an employé, stipulates for proof of loss satisfactory to the company's

officers, and requires full particulars of any claim arising upon the contract to be given in writing to the secretary of the company, within a specified time; and the declaration, in a suit upon the contract, alleges a compliance with these terms, but does not allege any waiver of the requisite proof of loss; and the evidence does not show that proof of loss was furnished; there is a fatal variance between the allegata and the probata, and it is error to refuse a nonsuit, even if evidence was introduced tending to show that the defendant had waived such proof of loss, as this would not sustain an allegation that the bank had furnished the proof of loss stipulated for by the contract. (*Fidelity etc. Ins. Co. v. Gate City Nat. Bank*, 440.)

24. **INSURANCE AGAINST LIABILITIES—CANCELLATION OF POLICY—EFFECT ON ACCRUED LIABILITY.**—Although a policy of insurance against liabilities issued and in force reserves the right of cancellation for nonpayment of premium, the exercise of such right does not prevent the insured from recovering any liability accruing under the policy between the time of its issuance and cancellation, less the premium earned up to the latter time. (*American Employers' Ins. Co. v. Fordyce*, 305.)

25. **ACCIDENT INSURANCE, NOTICE OF INJURY.**—If a policy of insurance provides that unless the claimant gives notice within seven days, stating the cause of injury, and within ninety days of the date of the injury and within thirty days of the date of the death verified proof thereof, all claims therefor shall be forfeited, an administrator suing upon a policy is not required to have given notice within seven days after the injury. This provision does not apply to action by persons other than the insured himself. (*Globe Ins. Co. v. Gerisch*, 486.)

26. **INSURANCE, LIFE—CONSTRUCTION OF POLICY—INCONTESTABLE CLAUSE.**—A life insurance association issuing a policy providing that it does not assume the risk of the death of the insured if caused by his own hand, but that such condition may be waived in writing, and then providing that after five years from the date of the policy it shall be "incontestable from any cause" except nonpayment of dues or mortuary assessments if the age of the applicant is correctly stated, is liable for the full amount of the policy, if the insured commits suicide or dies by his own hand more than five years after the policy is issued, provided the insured has stated his age correctly, and all dues and mortuary assessments have been paid up to the time of his death. (*Mareck v. Mutual Fund Res. Assn.*, 613.)

27. **INSURANCE—LIFE—WAIVER OF STATUTORY CONDITION.**—A provision in a life insurance policy that no claim of loss shall be made thereunder unless proof is presented within two years after the loss matures, is a waiver of a provision in the statute under which the policy is issued and payable, requiring proof of loss within ninety days after the death of the insured. (*Ellis v. Massachusetts etc. Ins. Co.*, 373.)

28. **INSURANCE—BENEFIT SOCIETIES.**—The constitution and by-laws of a beneficial association are elements of, and enter into, its contracts of insurance, and, while they measure and determine the member's duties and liabilities, also measure his rights as well. (*Sourwine v. Supreme Lodge*, 532.)

29. **INSURANCE—BENEFIT ASSOCIATIONS—EQUITABLE RIGHTS OF MEMBER.**—If a member of a beneficial association in good standing, and entitled under its constitution and by-laws to be transferred from one endowment class to another, requests to be so transferred, and does all that can be required of him to entitle him to enter such class and his request is wrongfully and arbitrarily re-

fused, equity, after his death, regards that as done which in good conscience ought to have been done, and grants relief as though it had been done, although the member never compelled the transfer by mandate, as he might have done. (*Sourwine v. Supreme Lodge*, 432.)

30. INSURANCE—BENEFIT SOCIETY—WAIVER OF RIGHTS. A member of a beneficial association in good standing who is entitled to a transfer to another class of membership, which he requests the association to make, does not waive his legal and equitable rights or acquiesce in the wrongful refusal of the association to transfer him, merely because he does not commence a proceeding in mandamus to compel such transfer, or make a formal tender of dues as a member of the class to which he is entitled to be transferred. (*Sourwine v. Supreme Lodge*, 432.)

See Corporations, 25; Executors and Administrators, 10; Usury, 7, 8.

INTEREST.

See Building and Loan Association, 1, 3; Warranty, 3; Usury,

INTERROGATORIES.

See Appeal, 8.

INTERVENTION.

See Mortgages, 6.

IRRIGATION.

See Waters, 6-9.

JOINDER.

See Banks, 15, 16, 19.

JOINT LIABILITY.

1. TORT FEASORS—JOINT LIABILITY.—Concert of action and common intent and purpose are generally necessary to make two or more persons joint tortfeasors and jointly liable, and if several distinct acts of several persons have contributed to a single injury, but without concert of action or common intent, there is generally no joint liability. (*Valparaiso v. Moffitt*, 522.)

2. TORT FEASORS—SEVERAL LIABILITY.—If there is no concert of action between tortfeasors, and their acts are separated as to time and place, but united in their consequences, the fact that it may be difficult to apportion the damages to each act or wrongdoer furnishes no ground to make one wrongdoer liable for all the damages. (*Valparaiso v. Moffitt*, 522.)

3. TORT FEASORS—SEVERAL AND JOINT LIABILITY.—Although there is no concert of action or unity of purpose between tortfeasors, yet if their acts are concurrent as to time and place and unite in setting into operation a single destructive and dangerous force which produces an injury, they are severally and jointly liable. (*Valparaiso v. Moffitt*, 522.)

4. JOINT LIABILITY—WRONGFUL ATTACHMENT AND SALE.—If several creditors, on the same day, sue out separate writs of attachment against a common debtor, and, without concert between them, cause such attachments to be wrongfully levied by the same officer, at the same time, upon property which they have good reason to believe has been conveyed by the debtor in fraud of their rights, and the sheriff, having been indemnified, sells such property, there is but a single trespass and cause of action, for which there can be only one recovery, or satisfaction and compensation; but the at-

taching creditors, in such cause of action, are jointly and severally liable. (*Vandiver v. Pollak*, 118.)

5. JOINT LIABILITY—LIBEL—AMOUNT OF RECOVERY.—If the plaintiff, in an action for libel against several joint defendants, recovers at all, the same amount must be awarded against all of the defendants found liable, and not a different sum against each. (*Hunter v. Wakefield*, 438.)

6. DAMAGES—TORT FEASORS—SATISFACTION OF LIABILITY.—A person injured by others acting severally may obtain several judgments against such persons in different amounts, but the payment of one judgment operates as a satisfaction of all. (*Valparaiso v. Moffit*, 522.)

7. JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—EFFECT OF.—The acceptance of the satisfaction of a judgment against one joint tort feasor, where there is but one cause of action, extinguishes the cause of action against the others. (*Vandiver v. Pollak*, 118.)

8. JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—TITLE TO PROPERTY—ACCOUNTING.—If several creditors, at the same time, but without concert, wrongfully attach the property of a common debtor, and cause it to be sold, and one of them satisfies a judgment for damages in favor of the owner of the property, he must, in seeking contribution from the others, who are also liable for such damages, use reasonable diligence in the enforcement of the title to the property, so as to render it available for the discharge of the common liability, and for any loss arising from his want of diligence, he is answerable; but he is not required to resort to suits against parties not residing in the state, or parties insolvent, or from whom satisfaction of judgment is not probable; and he will hold all recoveries, deducting the reasonable expenses attending them, for the equal benefit of himself and those from whom he seeks to exact contribution, and for which he may be compelled to account. (*Vandiver v. Pollak*, 118.)

9. JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—CONTRIBUTION.—If several creditors, acting separately and without concert, though simultaneously, sue out attachments against a common debtor, and cause them to be wrongfully levied, at the same time, and by the same officer, on property which is sold to satisfy their respective demands, they incur a common liability, and each is bound to contribute equally to the satisfaction of a judgment for damages, obtained by the owner of the property, upon the indemnifying bond of one of the creditors, without regard to the amount of their respective debts due from the debtor. (*Vandiver v. Pollak*, 118.)

10. JOINT LIABILITY—SATISFACTION OF JUDGMENT AGAINST ONE JOINT TORT FEASOR—TITLE TO PROPERTY.—If the owner of personal property sues in trespass for the wrongful taking thereof, or in trover for its conversion, and obtains a judgment of which he has received satisfaction, the title to the property is altered, and is, by operation of law, transferred to and vested in the wrongdoer; not, however, for his exclusive benefit. He must, in equity, be regarded as holding it in trust as a security for his reimbursement of the money paid in satisfaction of the judgment, which inures to the benefit of others who have incurred, with him, a common liability. (*Vandiver v. Pollak*, 118.)

11. JOINT LIABILITY—EFFECT OF SATISFYING JUDGMENT AGAINST ONE JOINT TORT FEASOR.—As the satisfaction of a judgment for damages upon the indemnity bond of one of several attaching creditors, who were joint wrongdoers, inures to the

benefit of all, operates as a bar to a separate suit against the others, and discharges the common liability, such satisfaction must, in a suit for contribution, be accepted as the measure of the common liability, and this may be shown by the judgment. (*Vandiver v. Pollak*, 118.)

12. JOINT LIABILITY.—THE DOCTRINE OF CONTRIBUTION is not founded on contract, but on the principle that equality of burden as to a common right is equity; that wherever there is a common right, the burden is also common. (*Vandiver v. Pollak*, 118.)

13. JOINT LIABILITY—CONTRIBUTION AMONG JOINT TORT FEASORS—PARTIES.—In a bill by a creditor for contribution against other creditors who have participated in benefits arising from wrongful attachments, and a sale of property thereunder, where he has satisfied a judgment for damages occasioned by the wrongful attachments, those creditors who levied other attachments subsequently to those under which the property was sold are not necessary parties, as these were separate and distinct trespasses for which they alone are suable and liable. (*Vandiver v. Pollak*, 118.)

14. JOINT LIABILITY—CONTRIBUTION BETWEEN JOINT TORT FEASORS—ILLUSTRATION.—If several creditors, acting separately and without concert, though simultaneously, sue out attachments and have them, at the same time and by the same officer, wrongfully levied on property which they have reasonable cause to believe has been conveyed by the common debtor in fraud of their rights; and the sheriff, upon being indemnified, sells the property, and applies the proceeds in payment of their respective demands; and the purchaser from the debtor, in an action upon the indemnity bond of one of the attaching creditors recovers damages for the wrongful taking and sale of the attached property, which damages such creditor has been compelled to satisfy, he is entitled to contribution from the other attaching creditors, who participated in the benefit resulting from the attachment and sale. (*Vandiver v. Pollak*, 118.)

15. JOINT LIABILITY—CONTRIBUTION OR INDEMNITY BETWEEN JOINT TORT FEASORS.—The general principle that contribution or indemnity will not be awarded as between joint wrongdoers, is limited to intentional, meditated wrongs, and has no just application when parties are acting in good faith, in ignorance of facts rendering their conduct tortious, and such ignorance is not superinduced by their own fault or negligence. (*Vandiver v. Pollak*, 118.)

See Nuisance, 2.

JUDGMENTS.

1. JUDGMENT.—JURISDICTION of the person and subject matter is essential to the validity of a judgment. (*Springer v. Shavender*, 708.)

2. JURISDICTION OVER NONRESIDENTS.—A personal judgment cannot be rendered against a nonresident who has not been served with process within the state. (*Griffith v. Milwaukee Harvest-er Co.* 573.)

3. JUDGMENT, WHEN VOID—JURISDICTION—CONSENT OR NEGLECT.—A judgment is void, not voidable, if the court has no jurisdiction of the subject matter of the action; and jurisdiction of such subject matter cannot be conferred by the assent or neglect of a person. (*Springer v. Shavender*, 708.)

4. JURISDICTION, DEFECTS IN ACQUIRING.—Where there has been a service of a required notice, and the proper court has determined that the service was sufficient, the subsequent proceedings based thereon are not void, but, at most, voidable on proper applica-

tion. The failure to serve notice twenty days before the first day of the term at which judgment is rendered does not make it void. (*Griffith v. Milwaukee Harvester Co.*, 573.)

5. JUDGMENT IN REM, WHAT IS.—A judgment that the plaintiff may have and recover against the defendant a sum, naming it, and that the property attached, describing it, be sold to satisfy such judgment, and that a special execution issue for the sale thereof, is a judgment in rem. (*Griffith v. Milwaukee Harvester Co.*, 573.)

6. JUDGMENTS IN REM—ESTOPPEL.—A judgment against property in favor of a city in special assessment proceedings to pay for street improvement already made in front of such property, to which the owner thereof is not a party and against which he did not appear nor defend, does not estop him from maintaining suit against the city for injury to his property by wrongfully lowering the established grade and removing lateral support. Such proceedings and judgment are in rem, and estop the owner only so far as they affect his right to, or ownership of, the property subsequent to seizure under such proceedings. (*Farrell v. St. Paul*, 641.)

7. JUDGMENT, PERSONAL, WHAT IS.—A judgment in a suit to foreclose a mortgage that the plaintiff have and recover from the defendants, naming them, a sum specified, that the mortgaged premises be sold, and, if the proceeds of the sale should prove insufficient to pay the judgment, that the sheriff specify the amount of the deficiency in his return of sale, and that on the coming in of such return the plaintiff have execution therefor, is a personal judgment upon which an action may be brought against the defendant. (*Meyer v. Brooks*, 790.)

8. A JUDGMENT IS NOT VOID because rendered against a defendant at a term of court next before that in which the plaintiff was entitled to have it rendered. (*Griffith v. Milwaukee Harvester Co.*, 573.)

9. JUDGMENTS BY DEFAULT—ESTOPPEL.—A judgment by default in foreclosure against a married woman who executed the mortgage foreclosed in consideration of an agreement that the mortgagee would foreclose, purchase the land, and pay her a certain part of the proceeds thereof, does not estop her from claiming the benefit of such agreement and maintaining suit thereon. (*Talbott v. Barber*, 491.)

10. JUDGMENTS—COLLATERAL ATTACK.—A decree in favor of the grantee of the widow of an intestate, quieting his title to land of the latter, rendered upon a warning order against unknown heirs, is void, either on direct or collateral attack, when the bill, upon which the decree is based, does not show that the title of such heirs has been divested. (*Hall v. Melvin*, 301.)

11. JUDGMENTS—COLLATERAL ATTACK.—If a bill in equity of a complaint shows no cause of action against the defendant with reference to the subject matter of the suit and tenders no issue, but, on the contrary, shows that there never could be any issue between parties as to such subject matter, a decree based thereon is a nullity and may be attacked, either directly or collaterally. (*Hall v. Melvin*, 301.)

12. JUDGMENTS AGAINST INFANTS—COLLATERAL ATTACK.—Judgment against an infant duly served with summons, but without the appointment of a guardian ad litem, though irregular and erroneous, is not void, and is not open to impeachment on collateral attack. (*Levystein v. O'Brien*, 56.)

13. JUDGMENT, RELIEF IN EQUITY.—If, after a trial at law, the right of appeal is cut off by the death of the presiding judge before he can sign a bill of exceptions, relief may be granted in

equity by compelling the adverse party to submit to a new trial, if the judgment appears to be contrary to equity and good conscience. (Kansas etc. R. R. Co. v. Fitzhugh, 211.)

14. JUDGMENT, RELIEF AGAINST IN EQUITY.—If the right of appeal is lost because of the death of the trial judge before he can sign a bill of exceptions, relief can be obtained in equity compelling the successful party to submit to a new trial, if the judgment is against equity and good conscience (Little Rock etc. Ry. Co. v. Wells, 216.)

15. A JUDGMENT WILL NOT BE RELIEVED AGAINST IN EQUITY BECAUSE OF MERE ERRORS committed by the trial judge in charging the jury, though the right of appeal is cut off by his death before he can sign a bill of exceptions, unless it further appears to be against equity and good conscience to permit the judgment to be enforced. (Little Rock etc. Ry. Co. v. Wells, 216.)

16. A JUDGMENT WILL BE RELIEVED AGAINST IN EQUITY where there was no evidence to show that the prevailing party had any cause of action, and his adversary's right of appeal was cut off by the death of the trial judge before he could sign a bill of exceptions. (Little Rock etc. Ry. Co. v. Wells, 216.)

17. JUDGMENTS—FRAUD IN OBTAINING—RELIEF.—If a defeated party has been prevented from fully exhibiting his case by fraud or deception practiced upon him by his adversary, as by keeping him away from court through a false promise of compromise, or where a defendant never had knowledge of a suit being kept in ignorance by the acts of the plaintiff, or in similar cases, a new trial may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair trial. (Street v. Alden, 632.)

18. JUDGMENTS—FRAUD IN OBTAINING RELIEF.—An action may be maintained to set aside the verdict of a jury given on an appeal from, and reversing on order of, a town board of supervisors vacating a highway, when such verdict was obtained by fraud. The action may be maintained by the owner of the land across which such highway ran, he having been one of the legal voters who petitioned for its vacation. (Street v. Alden, 632.)

See Attachment, 1; Estoppel, 4-7; Injunctions, 2, 3; Insolvency.

JUDICIAL NOTICE.

See Evidence, 4.

JURISDICTION.

1. JURISDICTION IS THE RIGHT to adjudicate concerning the subject matter in a given case. (Springer v. Shavender, 708.)

2. JURISDICTION—AVERMENTS OF PLEADING.—The power to decide, in any case, does not rest solely upon the averments of a pleading. (Springer v. Shavender, 708.)

3. JURISDICTION TO RENDER PERSONAL JUDGMENT, SPECIAL APPEARANCE DOES NOT GIVE.—If, in an action against a nonresident in which his property has been attached, and service of summons has been made on him by publication, he appears specially for the purpose of objecting to the jurisdiction of the court and moving to quash the attachment, the court does not thereby acquire jurisdiction over his person, and cannot render a valid personal judgment against him. (Meyer v. Brooks, 790.)

See Courts, 1; Judgments, 1-4.

JURY.

See Trial, 2.

LAKES.

See Waters, 2, 3.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—POSSESSION OF TENANT IS THAT OF LANDLORD.—Possession by a tenant is the possession of the landlord. Hence, in making out title by occupancy, the period covered by the possession of the landlord, and of his heirs after his death, is to be added to the period covered by the possession of the tenant under the heirs. (*Alexander v. Gibbon*, 757.)

2. LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE—PARTITION.—A tenant is estopped to deny the title of his landlord, and this rule applies, in a proceeding among heirs for partition, when sole seisin is pleaded by a tenant of the heirs. (*Alexander v. Gibbon*, 757.)

3. LANDLORD AND TENANT.—THE TENANT'S RIGHTS IN LEASED PREMISES are measured by, and cannot exceed, the rights of the landlord. (*Anderson v. Miller*, 812.)

4. LANDLORD AND TENANT—LIABILITY FOR DANGEROUS PREMISES.—A landlord who leases premises which are at the time in an unsafe and dangerous condition, is liable to his tenant for damages that may result therefrom, if he knows the fact and conceals it, or if by reasonable care and diligence he could have known of such dangerous and unsafe condition; provided, that the tenant exercises reasonable care and diligence to ascertain the condition of the premises. (*Hines v. Willcox*, 823.)

5. NEGLIGENCE—UNAUTHORIZED USE OF PROPERTY.—If a tenant having rented a building for the storage of vehicles uses it for the storage of cotton without authority, he is liable for an injury to the building by fire caused by the more dangerous and combustible nature of the cotton. (*Anderson v. Miller*, 812.)

6. NEGLIGENCE—USE OF LEASED BUILDING—PROXIMATE CAUSE.—If a tenant having leased a building for the storage of certain articles, uses it without authority for the storage of other and highly inflammable materials, with the result that the building is destroyed by fire, which would not have reached it but for the fact of such use, the inflammable material is the proximate cause of injury and the tenant is liable for the loss. (*Anderson v. Miller*, 812.)

See Adverse Possession, 2.

LARCENY.

1. LARCENY.—FOREIGN LAW IS PRESUMED to be the same as the domestic law as regards the crime of larceny. (*State v. Morrill*, 870.)

2. LARCENY BY ONE HAVING MERE CUSTODY OF PROPERTY.—One having the mere custody of another's property may commit larceny of it. Hence, if the owner gives his property to another to take to the owner's house, and such other person wrongfully sells it, he is guilty of larceny, although he conceived the intent and purpose to so dispose of it after he received it. (*Holbrook v. State*, 65.)

3. LARCENY—INTENT—RULE OF CONSTRUCTIVE POSSESSION.—The general rule, that to constitute larceny the felonious intent must exist at the time of the "taking and carrying away," does not militate against the rule of constructive possession by the owner, the defendant having but the bare custody, received from the owner, and, having such bare custody, fraudulently converts the money or goods. (*Holbrook v. State*, 65.)

4. LARCENY—DIFFERENT CRIMES ON ONE EXPEDITION. The theft of several articles at different and distinct times and places on the same expedition, from the same or different owners, creates distinct and separate larcenies. (*State v. Emery*, 878.)

5. LARCENY—THEFT OF SEVERAL ARTICLES—ONE PROSECUTION AS BAR.—The theft of several articles at one and the same time and place constitutes but one indivisible crime, even though the articles belong to different owners, and a conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others. (*State v. Emery*, 878.)

6. LARCENY—STEALING IN ONE STATE AND CARRYING INTO ANOTHER.—One who steals property in one state and carries it into a sister state may be punished in the latter as for a fresh larceny, and the same rule applies as to property stolen in a foreign country. (*State v. Morrill*, 870.)

7. LARCENY—STEALING IN ONE COUNTRY AND CARRYING INTO ANOTHER.—One who steals property in a foreign country and carries it into Vermont may be punished there as for a fresh larceny. (*State v. Morrill*, 870.)

See Criminal Law, 4.

LEGISLATURE.

1. CONSTITUTIONAL LAW—EVIDENCE, CHANGE IN RULES OF.—No one has a vested right in the rules of evidence. They pertain to the remedy, and are therefore subject to modification and control by the legislature. (*Meadowcroft v. People*, 447.)

2. CONSTITUTIONAL LAW—EVIDENCE, POWER TO MAKE FACTS PRIMA FACIE EVIDENCE OF CRIME.—The legislature has power to enact, even in criminal actions, that where certain facts have been proved, they shall be prima facie evidence of the main fact in question, if the fact proved has some fair relation to, or natural connection with, the main fact. (*Meadowcroft v. People*, 447.)

See Banks, 1.

LETTERS.

See Evidence, 8.

LIBEL.

LIBEL.—MORAL TURPITUDE is necessarily involved in the willful publication of a libel. (*Ex parte Mason*, 772.)

See Attorney and Client, 1, 2; Joint Liability, 5; New Trial, 3.

LIENS.

LIENS—STREET ASSESSMENTS—PRIORITY.—The last assessment for street improvements takes precedence as a lien over those previously made. (*Burke v. Lukens*, 539.)

See Corporations, 6; Factors, 1.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS OF ACTIONS—COMPUTATION OF TIME.—In computing time, under the present laws of North Carolina, to determine whether the statute of limitations has run, the time between May 20, 1861, and January 1, 1870, is no longer to be omitted, except in actions commenced before January 1, 1893. (*Alexander v. Gibbon*, 757.)

2. TRUSTS.—STATUTE OF LIMITATION does not begin to run against a continuing or executory trust to pay a certain portion

of the proceeds of a sale of land, even after the sale, until there is a disavowal of the trust, or a refusal to perform upon proper demand. (*Talbott v. Barber*, 491.)

3. TRUSTS.—STATUTE OF LIMITATIONS does not begin to run against a continuing or executory trust, until a disavowal of the trust or a refusal to perform upon proper demands. (*Talbott v. Barber*, 491.)

4. LIMITATION OF ACTIONS.—PARTIAL PAYMENTS OF THE PRINCIPAL and payment of the interest stand on the same footing as affect limitation of action. (*Meitzler v. Todd*, 531.)

5. LIMITATION OF ACTIONS.—PARTIAL PAYMENTS AS AFFECTING SURETY.—Partial payments made by a principal without the knowledge of the surety do not operate to keep the obligation alive as to the surety. It may be barred as to the latter by limitation. (*Meitzler v. Todd*, 531.)

6. LIMITATION OF ACTIONS.—PARTIAL PAYMENTS made by a principal keep the obligation alive as to himself, although it may become barred as to the surety. (*Meitzler v. Todd*, 531.)

7. STATUTE OF LIMITATIONS.—NEW PROMISE OR ACKNOWLEDGMENT.—If the maker of a note, in response to a letter from the holder asking whether he intends to settle the note held against him by the writer, answers that he will pay what he can and what is right, such answer is not sufficiently clear and unqualified as to constitute a new promise or admission of indebtedness. (*Nelson v. Hanson*, 568.)

See Insurance, 13.

LIVESTOCK.

See Railroads, 1-4.

MALICE.

See Actions.

MARKET VALUE.

See Evidence, 17; Witnesses, 8.

MARRIAGE.

See Contracts, 1, 4, 5, 10.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—BREACH OF PROMISE—UNCHASTITY AS DEFENSE.—Knowledge of the unchastity of a woman acquired after a promise made to marry her, is a good defense to her action to recover for a breach of such promise. (*Foster v. Hanchett*, 886.)

2. MARRIAGE AND DIVORCE—BREACH OF PROMISE—UNCHASTITY AS DEFENSE.—The general reputation of a woman for unchastity is no bar to her action for breach of promise of marriage. To constitute unchastity a defense the defendant must not only prove her to be actually unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry. (*Foster v. Hanchett*, 886.)

3. MARRIAGE AND DIVORCE—LAND AS ALIMONY.—In divorce proceedings based on constructive notice to the defendant, and under a complaint alleging sufficient grounds for divorce and alimony, and praying that certain land of the defendant be awarded as alimony, the court may so award the land, provided it is within its jurisdiction and the notice to defendant contains a particular description of the land and the nature of the relief demanded. (*Wesner v. O'Brien*, 604.)

4. MARRIAGE AND DIVORCE—LAND AS ALIMONY.—If an action for divorce is rightfully and properly brought in the county in which the plaintiff resides, any land belonging to the defendant within the operation of the laws of the state, no matter in what county situated, and which has been brought within the control and jurisdiction of the court by proper averment and notice, may be appropriated and awarded as alimony as an incident of the divorce proceedings. (*Wesner v. O'Brien*, 604.)

MARSHALING SECURITIES.

See Debtor and Creditor, 1.

MASTER AND SERVANT.

1. MASTER AND SERVANT.—THE DOCTRINE OF RESPONDEAT SUPERIOR has no application when the servant actually wills and intends an injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong. Hence, the servant, and not the master, is liable for the acts of the former willfully and intentionally done. (*Goodloe v. Memphis etc. R. R. Co.*, 67.)

2. CORPORATIONS—LIABILITY IN DAMAGES FOR ACTS OF SERVANTS.—Railroad companies and other corporations are not liable in punitive damages for the wanton or oppressive acts of their agents or servants, not participated in nor ratified by the corporation. (*Warner v. Southern Pac. Co.*, 327.)

3. DAMAGES, EXEMPLARY, AGAINST MASTER.—A master is liable only for actual or compensatory damages caused by an act of his servant done in the execution of authority given by the master, but performed in a reckless, wanton, and unlawful manner, not participated in, authorized, nor ratified by the master. In such case, the master is not liable for vindictive damages or smart money. (*Warner v. Southern Pac. Co.*, 327.)

4. EMPLOYER AND EMPLOYEE—CAUSING DISCHARGE OF THE LATTER.—If one in the exercise of a lawful right threatens to terminate a contract between himself and another unless the latter discharges his employé, not engaged for any definite time, the discharged employé has no right of action for damages against the party making the threat, although his motive in procuring the discharge may have been inspired by malice. (*Raycroft v. Tayntor*, 882.)

See Railroads, 8-12; Suretyship, 4.

MECHANIC'S LIEN.

1. MECHANICS' LIENS—CONSTRUCTION OF MANTELS—CONTRACTOR OR MATERIALMAN.—A person who contracts with the owner of a building in process of construction to set up therein mantels already put together, the labor of delivering and setting up the mantels being small as compared with their value, is, within the meaning of the mechanics' lien law, a materialman, and not an original contractor. (*Bennett v. Davis*, 354.)

2. MECHANICS' LIENS—CONTRACTOR OR MATERIALMAN. If the labor bestowed upon placing materials in a building in process of construction is trifling as compared with the price of the materials, the person furnishing such labor and materials is a materialman, and if the value of the materials is trifling in value as compared with the labor, he is an original contractor, within the meaning of the mechanics' lien law. (*Bennett v. Davis*, 354.)

MINORS.

See Guardian and Ward.

MISREPRESENTATIONS.

See Estoppel, 3.

MISTAKE.

See Estoppel, 3; Trover, 4.

MORTGAGES.

1. MORTGAGES—NOTICE—TORT.—Notice of a mortgage is wholly without efficacy in guarding one against suffering damage by a pure tort at the hands of the mortgagor. (*Green v. Coast Line R. Co.*, 379.)

2. MORTGAGES—CORPUS—INCOME.—If income, as well as corpus, is embraced in a mortgage, the mortgagee excludes himself from all the income which accrues while he voluntarily remains out of possession. A right of possession which he declines to exercise is of no avail. (*Green v. Coast Line R. R. Co.*, 379.)

3. MORTGAGE OF INCOME covers net income only. (*Green v. Coast Line R. R. Co.*, 379.)

4. TRUST—PROCEEDS OF LAND—CONSIDERATION.—If a married woman joins in the execution of a mortgage of her husband's land, this is sufficient consideration for an agreement by the mortgagee to foreclose the mortgage, purchase the land at foreclosure sale, and pay her one-third of the proceeds of such sale. (*Talbott v. Barber*, 491.)

5. MORTGAGES—FORECLOSURE—AMENDMENT OF MISTAKE APPARENT FROM THE RECORD.—In an action to foreclose a mortgage, clerical mistakes in the findings as to the amount due, and in the decree as to the description of the property, apparent from the face of the record, may be corrected by the court on its own motion with or without notice. (*Dickey v. Gibson*, 321.)

6. MORTGAGES—EQUITY—FORECLOSURE—INTERVENTION.—If a mortgagee has, by the terms of his mortgage, a right to take possession after default of payment, but, instead of exercising this right, leaves the mortgagor in possession, he submits himself to do equity toward any creditor of the mortgagor who may rightly intervene in the foreclosure proceedings. (*Green v. Coast Line R. R. Co.*, 379.)

See Attachment, 3; Building and Loan Associations, 1; Chattel Mortgages; Homestead, 7; Husband and Wife, 3-5, 9, 10; Insurance, 20; Judgments, 7; Receivers, 2-4.

MORPHINE.

See Statutes, 1-3.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS. STREETS. BOND IN FAVOR OF PERSONS DOING WORK UNDER CONTRACTORS.—If a bond is executed by persons to whom work upon a public street has been awarded, stipulating that as soon as the work shall be completed they will pay to the proper parties all amounts due for material and labor, and that the bond may be sued upon at the instance of any materialman, laboring man, or mechanic in the name of the city, every person performing labor or furnishing materials upon the work is entitled to the benefits intended to be afforded him by such bond. (*St. Louis v. Von Phee*, 695.)

2. MUNICIPAL CORPORATION. POWER OF TO TAKE BOND FOR PROTECTION OF PERSONS WORKING ON ITS STREETS.—A municipality authorized to make improvements upon

its public streets and to exact of the contractor his bond for the faithful performance of his contract has power to require such bond to contain a condition that the contractor will pay all persons performing labor or furnishing materials at his request and for the purpose of assisting him in the completion of his contract. (*St. Louis v. Von Phul*, 695.)

3. MUNICIPAL CORPORATIONS—ORDINANCES.—COURTS HAVE POWER to inquire into any alleged abuse of the powers of cities and towns in the enactment of ordinances, and to restrain them when they transcend the limits of their authority. (*State v. Taft*, 768.)

4. MUNICIPAL CORPORATIONS—ORDINANCES—SECOND HAND CLOTHING.—A town which has power to abate nuisances, and to preserve the public health, may, by ordinance, restrict the sale of secondhand clothing by compelling fumigation and disinfection, or requiring proper assurances that it has not been obtained from infected places. (*State v. Taft*, 768.)

5. MUNICIPAL CORPORATIONS—POLICE POWER—LAWFUL BUSINESS—SECONDHAND CLOTHING—UNREASONABLE ORDINANCE.—Municipal authorities cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. Hence, as the sale of secondhand clothing is not a nuisance per se, an ordinance which absolutely prohibits the importation and sale of such clothing is unreasonable and void, because it prohibits a business lawful in itself, and not necessarily injurious or dangerous. (*State v. Taft*, 768.)

6. NUISANCE.—MUNICIPAL CORPORATIONS are liable for erecting and maintaining a nuisance, the same as natural persons. (*Valparaiso v. Moffitt*, 522.)

7. MUNICIPAL CORPORATIONS—ABATEMENT OF NUISANCE—LAWFUL BUSINESS.—Power given to a town to abate nuisances does not authorize it to prohibit, absolutely, a lawful business which is not necessarily a nuisance, but it may abate such business when it is so carried on as to constitute a nuisance. (*State v. Taft*, 768.)

MUTUAL BENEFIT SOCIETIES.

See Insurance, 28-30.

MUTUALITY.

See Estoppel, 1.

NAMES.

See Arson, 3.

NEGLIGENCE.

1. NEGLIGENCE, PRESUMPTION OF FROM THE HAPPENING OF AN ACCIDENT.—The mere happening of an accident, together with the exercise of ordinary care by the plaintiff, does not alone raise a presumption of negligence on the part of a common carrier. (*Chicago etc. Ry. Co. v. Rood*, 478.)

2. IF NO FAULT OR NEGLIGENCE is imputable to either party, a loss must remain where the course of business has placed it, and no cause of action arises thereon. (*Lyndonville Nat. Bank v. Fletcher*, 874.)

3. NEGLIGENCE, CONCURRENT.—When an injury occurs through the concurrent negligence of two persons, and would not have happened in the absence of either, the negligence of both is

the proximate cause of the accident, and both are answerable. (*City Electric etc. Ry. Co. v. Conery*, 262.)

4. NEGLIGENCE IN INJURING NEGLIGENT PERSON.—There can be no recovery for damages caused by negligence to which the person injured contributed, but when the negligent act which caused the injury is done after the negligence of the injured party is known to the other party, and the injury might have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery. (*Keefe v. Chicago etc. Ry. Co.*, 542.)

5. NEGLIGENCE—QUESTION OF LAW OR FACT.—If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question of negligence is one for the jury; otherwise, it is for the court. (*Ryder v. Kinsey*, 623.)

See Banks, 2, 7, 8; Carriers, 4; Damages, 5; Landlord and Tenant, 5, 6; Railroads, 11-14, 18-22; Real Property, 2-10.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS, EVIDENCE OF OWNERSHIP.—The possession of a note indorsed in blank is *prima facie* evidence of ownership, and, in the absence of rebutting evidence, entitles the plaintiff to recover thereon. The indorsement need not be filled up before offering the note in evidence. (*Berney v. Steiner*, 144.)

2. NEGOTIABLE INSTRUMENT IN THE POSSESSION OF THE PAYEE.—If a negotiable instrument, though it has been indorsed, comes again into the possession of the payee, he is entitled to recover thereon, regardless of its condition as to indorsement, unless the defendant can establish the plaintiff's want of title. (*Berney v. Steiner*, 144.)

3. PROMISSORY NOTES GIVEN AS RENEWALS OF OTHER NOTES are but evidences of the same indebtedness, and property exempt from execution or attachment for the original notes is equally exempt from the renewals. (*Wallowa Nat. Bank v. Riley*, 794.)

4. NEGOTIABLE INSTRUMENTS.—RESTRICTED INDORSEMENTS—EFFECT OF.—If the owner of a draft indorses it "for collection," or "for," or "on account of," the owner, this is a restricted indorsement and gives notice that the draft is the property of the owner, and that it is no longer negotiable, and one acquiring it thereafter cannot claim protection as an innocent purchaser. (*People's Bank v. Jefferson County Sav. Bank*, 59.)

5. NEGOTIABLE INSTRUMENTS—INDORSEMENT TO FICTITIOUS PERSON—FORGERY.—The indorsement of a draft by the payee to the order of a fictitious person in good faith, believing him to be real, is not in law an indorsement to bearer, and the subsequent indorsement of the name of such fictitious indorsee by a third person without authority, is a forgery and does not protect the drawee bank in the payment of the draft to other than the payee named therein, and it is still liable to him for its value. (*Chism v. First Nat. Bank*, 863.)

6. NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENT—STATUTE OF FRAUDS.—If one, not a party to a negotiable note, after it has been delivered to, and while it is in the hands of, the payee, indorses it in blank upon a valuable consideration, for the purpose of assuming the liability of a guarantor, such act, authorizes the payee to write over the signature the contract of guaranty in full, and, that being done, it is a sufficient note or memor-

andum in writing to take the case out of the statute of frauds. (*Peterson v. Russell*, 634.)

7. **NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENT—EVIDENCE TO FIX LIABILITY.**—If one, not a party to a negotiable note, after it has been delivered to, and while it is in the hands of the payee, indorses it in blank, upon a valid consideration, parol evidence is admissible to fix his liability as maker, indorser, or guarantor, according to the intention of the parties. (*Peterson v. Russell*, 634.)

8. **NEGOTIABLE INSTRUMENTS—EXTENSION OF TIME OF PAYMENT—CONSIDERATION.**—Extension of time of payment of a note past due is a sufficient consideration for a promise to pay it. (*Peterson v. Russell*, 634.)

9. **PRACTICE.—NO DEPARTURE FROM A COMPLAINT** on a negotiable instrument arises from a replication filed by the plaintiff alleging the true nature of his ownership, though his source of title is not the same as disclosed in the complaint. (*Berney v. Steiner*, 144.)

See Banks, 2-6; Corporations, 7, 11, 12; Executors and Administrators, 3-7; Guaranty, 2, 3.

NEW PROMISE.

See Limitations of Actions, 7.

NEWSPAPERS.

See Contracts, 23.

NEW TRIAL.

1. **NEW TRIAL—SURPRISE—WAIVER.**—The right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause. (*Bayonne Knife Co. v. Umbenhauer*, 114.)

2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—A motion for a new trial, upon the ground of newly discovered evidence, should be overruled if, by reasonable diligence, the evidence could have been obtained at the time of trial. (*Bayonne Knife Co. v. Umbenhauer*, 114.)

3. **NEW TRIAL—JOINT LIABILITY—LIBEL—PARTIES TO BILL OF EXCEPTIONS.**—If, in an action for libel against several joint defendants, there has been found a verdict for the plaintiff against some only of the defendants, and a verdict in favor of the other defendants, there can be no new trial between the plaintiff and the latter alone, but, if granted at all, it must be as to all the parties. Hence, all of the defendants below are necessary parties to a bill of exceptions sued out by the plaintiff for the purpose of obtaining a new trial, and, if some of them are not made parties, the writ of error must be dismissed. (*Hunter v. Wakefield*, 438.)

4. **PRACTICE, NEW TRIAL, REVIEW, OF ORDER GRANTING.**—If it appears that a new trial was granted upon grounds stated by the court and which were insufficient to warrant its action, such action cannot be defended nor a reversal of the order granting the new trial avoided, on the ground that the court might have been warranted in its action by some other ground stated in the motion for a new trial, but upon which the court does not appear to have based its action. (*Bradley v. Rappell*, 685.)

See Instruction, 4; Judgments, 14, 16.

NONRESIDENTS.

See Judgments, 2.

NOTARIES PUBLIC.

EVIDENCE.—**CERTIFICATE OF PROTEST** by a notary public of another state attested by his seal is prima facie evidence that the acts indicated were done by the notary. (*Fletcher v. Arkansas Nat. Bank*, 294.)

See Affidavits.

NOTICE.

See Mortgages, 1; Suretyship, 5.

NUISANCE.

1. **NUISANCE—CONTINUING—LIABILITY.**—Every continuance of a nuisance makes a new one creating a new liability, and, if the nuisance is continued one recovery does not bar a subsequent action. (*Valparaiso v. Moffitt*, 522.)

2. **NUISANCE—JOINT AND SEVERAL LIABILITY.**—All persons, whether natural or artificial, or both together, who create and maintain a public nuisance are jointly and severally liable for all damages resulting therefrom, although they are not tort feorsors and a release given by one of them does not release all unless it is in full satisfaction of all the injury sustained by reason of the nuisance. (*Valparaiso v. Moffitt*, 522.)

3. **TORT FEASORS—NUISANCE—JOINT AND SEVERAL LIABILITY.**—If the acts of tort feorsors are separate and distinct as to time and place, but culminate in producing a public nuisance, which injures the person or property of another they are jointly and severally liable. (*Valparaiso v. Moffitt*, 522.)

See Municipal Corporations, 4-7.

OFFICERS.

1. **PUBLIC OFFICERS—RESPONSIBILITY AS TO PUBLIC FUNDS.**—A public officer intrusted with public funds is not an insurer against their loss and is responsible only for the exercise of good faith, diligence, prudence, and caution for their safekeeping. (*State v. Copeland*, 840.)

2. **PUBLIC OFFICERS—LIABILITY AS TO PUBLIC FUNDS.** The measure of the liability of a public officer for the safety of public funds intrusted to him is fixed by the laws relating to his office, and not merely by the terms of his official bond. (*State v. Copeland*, 840.)

3. **PUBLIC OFFICERS—RELATION OF TO PUBLIC FUNDS.** A public officer intrusted with public funds is not a debtor as to them, nor has he the right to use them in any way except for the purpose of the trust, and he holds them, not strictly as a special bailee, but as a trustee, clothed with legal duties and liabilities as such. (*State v. Copeland*, 840.)

4. **PUBLIC OFFICERS—RIGHT TO DEPOSIT PUBLIC FUNDS IN BANK.**—A public officer intrusted with public funds who deposits them in a bank of undoubted standing and reputation at the time of deposit, without interest or profit to himself, is not guilty of negligence nor want of proper business prudence and caution as to their preservation so as to render him liable for their loss upon the failure of such bank. (*State v. Copeland*, 840.)

See Corporations, 11-17.

OPINIONS.

See Witnesses, 5-7.

OPIUM.

See Statutes, 1-3.

ORDINANCES.

See Municipal Corporations, 3-5.

PARDON.

A PARDON MAY BE GRANTED ON CONDITION that the person pardoned depart from, and remain without, the state, though the state constitution declares that under no circumstances shall any person be exiled from the state. (*Ex parte Hawkins*, 209.)

PAROL.

See Evidence, 9-12.

PARTIES.

See New Trial, 3.

PARTITION.

1. PARTITION—PLEADING.—An allegation of possession in a petition for partition is not required. (*Alexander v. Gibbon*, 757.)

2. PARTITION—RIGHTS OF HEIR—PRACTICE.—If partition is sought by an alleged heir only as to real estate of which he claims a portion and no part has been sold for the payment of debts, and no division has been made, he may have specific relief as to the property itself, and need not pursue the circuitous remedy prescribed by statute, of contribution in the probate court. (*Shorten v. Judd*, 587.)

3. PARTITION AMONG HEIRS—SOLE SEISIN—EVIDENCE. If, in a proceeding, for partition, among heirs, who are tenants in common, the husband of one of the feme defendants is made a party defendant, and he pleads sole seisin, it is competent to show that he entered under a contract and agreement with the heirs to pay taxes, and to look after, and to take care of, the property for the heirs, as this would create, as between him and the heirs, the relation of landlord and tenant. Such evidence is also admissible to establish the fact of tenancy as affecting the question of title by occupancy. (*Alexander v. Gibbon*, 757.)

4. PARTITION—DEED FOR, BY COTENANTS.—A deed entered into by several cotenants for the purpose of effecting a partition of the common property, is void as to all of them if one of the cotenants refuses and fails to execute the deed. (*Center v. Davis*, 352.)

5. PARTITION—TENANTS IN COMMON — EJECTMENT.—When sole seisin is pleaded, in a proceeding among tenants in common for partition, it becomes substantially an action of ejectment, subject to the general rules applicable to all actions of ejectment. (*Alexander v. Gibbon*, 757.)

See Landlord and Tenant, 2.

PAYMENT.

1. PAYMENT IS PRESUMED AFTER THE LAPSE OF TWENTY-SEVEN YEARS from the maturity and last indorsement of payment of interest on a note, although the statute of limitations has not barred an action thereon because of the nonresidence and absence of the defendant. (*Courtney v. Staudenmeyer*, 592.)

2. CONTRACTS PAYABLE IN SPECIFIC ARTICLES at a time and to an amount specified, may, within that time, be paid either in

such articles or in cash, but after the expiration of such time become payable in money alone if required by the creditor. (*Smith v. Coolidge*, 902.)

See Contracts, 25, 26; Limitations of Actions, 4-6; Negotiable Instruments, 8.

PENALTY.

See Damages, 3.

PERSONAL PROPERTY.

PERSONAL PROPERTY—POSSESSION OF OWNER.—The mere fact of putting one's property into the charge or possession of another does not divest the possession of the owner. The legal possession still remains in him. (*Holbrook v. State*, 65.)

See Contracts, 8.

PHOTOGRAPHS.

See Evidence, 18.

PLEADING.

1. PLEADING AND EVIDENCE—VARIANCE.—Although the complaint in an action avers an express promise, a recovery may be had upon proof of an implied promise. (*Pence v. Beckman*, 505.)

2. PLEADING DEFECTS IN WORKMANSHIP.—An allegation that a party who had undertaken to put a window in a house did so in a negligent and unskillful manner, and, on account of his so doing, the rain came through the window where it was connected with the house, and damaged certain property (describing it), sufficiently designates the respects in which the work was defective. (*Krebs Mfg. Co. v. Brown*, 188.)

3. THE DEFENSE OF THE STATUTE OF FRAUDS MAY BE RAISED BY DEMURRER when the complaint shows that the contract was not in writing, as where it states that a contract not to disinherit a person by will was oral. (*Dicken v. McKinley*, 471.)

See Banks, 17-21; Contracts, 27, 28; Corporations, 26; Ejectment; Equity, 6; Jurisdiction, 2; Partition, 1; Suretyship, 6; Trover, 5.

PLEDGE.

See Assignment for the Benefit of Creditors, 3, 5; Corporations, 9, 10, 18.

POLICE POWER.

THE POLICE POWER IS THAT INHERENT AND PLENARY POWER which enables the state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society. All persons possess their rights, whether to things tangible or intangible, subject to the general police power of the state. (*Meadowcroft v. People*, 447.)

POSSESSION.

See Chattel Mortgages, 1; Landlord and Tenant, 1; Negotiable Instruments, 1, 2; Personal Property; Real Property, 1; Trover, 1.

PRECEDENTS.

See Courts, 3.

PREFERENCES.

See Assignment for the Benefit of Creditors, 4; Corporations, 19, 20.

PREMIUM.

See Building and Loan Associations, 1; Insurance, 4, 15, 18.

PRESENTMENT.

See Checks, 2, 3.

PRESUMPTIONS.

See Adverse Possession, 1; Common Law; Evidence, 2, 3; Larceny, 1; Negligence, 1; Payment, 1; Railroads, 21, 22.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PRIORITY.

See Chattel Mortgages, 6; Liens; Receivers, 3, 4.

PRIVILEGED COMMUNICATIONS.

See Attorney and Client, 3.

PRIVITY.

See Contracts, 24; Searchers of Records.

PROBATE.

See Courts, 1; Equity, 1-3.

PROCESS.

WITNESS, SERVICE OF PROCESS ON.—If a person is present in a county other than that of his residence, for the sole purpose of attending the taking of a deposition therein in a cause to which he is a party, and advantage is taken of his presence to serve process on him in another action, to compel him to defend it in a jurisdiction other than that of his residence, the service of such process should be quashed. (Powers v. Arkadelphia Lumber Co., 276.)

See Courts, 2.

PROFITS.

See Corporations, 15, 16.

PROOFS OF LOSS.

See Insurance, 10-12.

PROTEST.

See Notaries Public.

PROXIMATE CAUSE.

See Negligence, 3; Railroads, 15.

PROXY.

See Corporations, 3-5.

PUBLIC LANDS.

See Execution, 2.

PUNISHMENT.

See Trial, 6.

RAILROADS.

1. **A RAILWAY COMPANY SHIPPING LIVESTOCK MUST PROVIDE** reasonably safe cars for the transportation of stock, and, when such a car is provided, and the stock is injured because of its viciousness or disposition to kick or otherwise so act as to injure itself or other animal, where the injury is not the result of neglect on the part of the company to properly care for the stock, the carrier is not liable. (*Betts v. Chicago etc. Ry. Co.* 558.)

2. **A CARRIER IS BOUND TO PROVIDE** a reasonably safe car for the transportation of stock, having in view such conduct as is usual or ordinary for it, even though such conduct may be the result of its natural propensities, but, if such a car is provided, and the stock is injured because of its natural propensity to kick, the carrier is not liable. (*Betts v. Chicago, etc., Ry. Co.* 558.)

3. **CARRIERS OF LIVESTOCK.—A REASONABLY SAFE CAR** is not one that will merely hold or confine the stock for transportation, but it must be a car reasonably safe for transporting the stock without injury from any cause that should be reasonably anticipated. Though the car is sufficient to confine the stock, yet it must be strong enough to resist the ordinary acts and usual conduct of such stock when carried on cars, such, for instance, as kicking, and if, through the weakness of the car and such acts, injury to the stock results, the carrier is answerable. (*Betts v. Chicago, etc. Ry. Co.* 558.)

4. **A WAIVER ON THE PART OF A RAILWAY CORPORATION** of a stipulation in a contract to give notice in writing of a claim of injury to stock shipped by it before removing such stock from its place of destination and before mingling it with other stock may be inferred from its referring the claim to its claim department and subsequently requesting that a bill of the alleged damages be made out, and, after it was made out, offering to pay certain items thereof. (*Hudson v. Northern Pac. Ry. Co.* 550.)

5. **RAILROADS—PASSENGERS—CARE REQUIRED.—A railroad company** is under the duty of exercising extraordinary diligence for the safety of its passengers. (*Gardner v. Waycross etc., R. R. Co.* 435.)

6. **RAILROADS—PASSENGERS, WHO ARE—PURCHASE OF TICKET.—A person** who is going a short distance and gets on a train about to start from a station at which there is no ticket office is a passenger, though he has not purchased a ticket, if he has money with him with which to buy a ticket. (*Gardner v. Waycross etc. R. R. Co.* 435.)

7. **TRIAL—NONSUIT—NEGLIGENT INJURY TO PASSENGER ON RAILROAD—QUESTION FOR JURY.—If a passenger on a train** about to start, wishing to see the conductor on business connected with his journey, goes into the baggage-car for that purpose, and, while there, is thrown down and injured by the sudden bumping of cars, it is error to nonsuit him, in an action for damages, as the questions whether he, in view of all the evidence submitted, was rightfully in the baggage-car, whether the injury resulted from the company's negligence, and whether it might have been avoided by the exercise of ordinary diligence on his part, should be submitted to the jury. (*Gardner v. Waycross etc. R. R. Co.* 435.)

8. **RAILROADS—LIABILITY IN DAMAGES FOR ACTS OF CONDUCTOR.—A railroad corporation,** though liable in actual damages, cannot be charged with punitive, or vindictive damages for the illegal, wanton, and oppressive conduct of a conductor on one

of its trains toward a passenger, unless it either authorizes or ratifies such conduct. (*Warner v. Southern Pac. Co.* 327.)

9. FALSE IMPRISONMENT—LIABILITY OF MASTER FOR ACT OF SERVANT.—Arrest and imprisonment of an innocent person procured by a railroad detective, acting within the scope of his authority, renders the company liable, although he exceeded his authority and acted contrary to instructions. (*Eichengreen v. Railroad*, 333.)

10. MASTER AND SERVANT—ACT OF SERVANT FOR WHICH MASTER IS NOT LIABLE.—If a sleeping-car conductor of a railroad company is standing near the entrance to a coach, and a friend of his, a superintendent of division of the same company, comes up and makes a lick at him, in sport, with his hand, and the conductor throws up his hand as if to ward off the blow, but in doing so knocks or pushes his friend against a person who is about to enter a coach as a passenger, thereby causing the latter to fall off the platform and injure himself, the employes, if anybody, and not the railroad company, are liable for such injury, as such acts are not in the line of their respective engagements, and are not fairly incidental to their employment. (*Goodloe v. Memphis etc. R. R. Co.* 67.)

11. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.—One employed in the yard of a railway company in the presence of tracks and cars and engines moving thereon must be reasonably diligent in guarding against accidents, and especially to keep out of the way of moving engines and cars. (*Keefe v. Chicago etc. Ry. Co.* 542.)

12. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.—One who is himself negligent on the tracks in the yard of a railway, and is there injured by being struck by a locomotive, cannot recover for that injury merely because the persons in charge of the locomotive were negligent in not seeing him, and therefore did not take the measures to insure his safety. (*Keefe v. Chicago etc. Ry. Co.* 542.)

13. NEGLIGENCE—DUTY TO LOOK AND LISTEN.—A mere passenger in a vehicle, with no control over the driver or his management of his team, and with no knowledge that he is careless or incompetent, is not without more, and as matter of law, guilty of negligence in failing to look and listen when approaching a railway crossing, so as to bar his right to recover in case he is injured by a collision. (*Howe v. Minneapolis etc. Ry. Co.* 616.)

14. NEGLIGENCE—DUTY TO LOOK AND LISTEN.—A passenger riding by invitation in a vehicle owned and driven by another, over whom he has no control, without any relation of master and servant, or principal and agent between them, and without being engaged in any joint enterprise and without knowledge on the part of the passenger that such driver is careless or incompetent, is not guilty of negligence per se in failing to look and listen for an approaching train at a railway crossing; and, if he is injured in a collision at such crossing, the question of his contributory negligence is for the jury to determine. (*Howe v. Minneapolis etc. Ry. Co.* 616.)

15. RAILROADS—NEGLECT TO PROVIDE HEADLIGHT—PROXIMATE CAUSE OF INJURY.—If a person lying on a railroad track, at night, is run over and killed by an engine having a tender in front, with no headlight, and the jury find that the engineer might, by the use of a headlight, have seen the person in time to avoid the injury, then the failure to provide a headlight, and to have it at the front, was a continuing negligent omission of duty, constituting the proximate cause of the injury, as the performance of this duty would have given the railroad company the "last clear

chance" to avoid the injury. (*Lloyd v. Albemarle etc. R. R. Co.* 764.)

16. RAILROADS—HEADLIGHT—IDLE EVIDENCE.—It is idle to offer witnesses to conclude either courts or juries from inquiring whether a headlight helps an engineer to see or so blinds him as totally to prevent his seeing. (*Lloyd v. Albemarle etc. R. R. Co.* 764.)

17. RAILROADS—HEADLIGHT AND STOPPING TRAIN—QUESTIONS FOR JURY.—If a person lying insensible on a railroad track is run over and killed by a train of cars, it is a question for the jury to determine, by the exercise of common sense and the use of knowledge acquired by observation and experience, as to how far an engineer can see an object on the track with a headlight, and as to the distance within which a moving train can be stopped. (*Lloyd v. Albemarle etc. R. R. Co.* 764.)

18. RAILROADS—PERSON LYING ON TRACK—INJURIES—CONCURRENT NEGLIGENCE.—Though a person lying insensible upon a railroad track is drunk, and is run over and killed by a railroad train, his negligence is not deemed concurrent, where the company's servants, by the exercise of ordinary care, could have seen him in time to prevent the injury by the proper use of the appliances at their command. (*Lloyd v. Albermarle etc. R. R. Co.*, 764.)

19. NEGLIGENCE, CONTRIBUTORY, WHEN DOES NOT PREVENT RELIEF.—If a person is placed in a position of danger from an approaching locomotive through his own negligence, but the engineer in charge becomes aware of the danger in time to avoid the injury by the exercise of ordinary care, and through his failure to exercise it the person so imperiled is injured, he is entitled to recover therefor. (*Kansas etc., R. R. Co. v. Fitzhugh*, 211.)

20. ELECTRIC STREET RAILWAYS, DUTY OF TO AVOID INJURIES.—For any negligence respecting its trolley wire, charged with a powerful current of electricity, whereby that current escapes through any other conductor brought in contact with the trolley, a street railway corporation is answerable to a person injured in the public streets and guilty of no culpable neglect contributing to his injury. (*City Electric etc. Ry. Co. v. Conery*, 262.)

21. A STREET RAILWAY CORPORATION WILL NOT BE PRESUMED to have been negligent from the mere happening of an accident whereby a passenger, in the exercise of ordinary care and while riding upon a car of such corporation, was injured in a crowded street by being struck by a wagon or the harness of a team which was driven by some person not under the control of such corporation. (*Chicago etc. Ry. Co. v. Rood*, 478.)

22. STREET RAILWAYS—ACCIDENT, PRESUMPTION FROM. The happening of an accident to a passenger upon a street-car while he is in the exercise of ordinary care does not raise a presumption of negligence against a carrier, unless it appears that the circumstances attending the accident were such as to indicate that it would not have happened if the carrier had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to maintain such machinery or apparatus. (*Chicago etc. Ry. Co. v. Rood*, 478.)

See Master and Servant, 2; Receivers, 3.

RAPE.

See Incest, 1.

REAL PROPERTY.

1. REAL PROPERTY—POSSESSION.—The law presumes the possession to be in the owner, where there is no adverse possession. (*Alexander v. Gibbon*, 757.)

2. PARTITION FENCES—LIABILITY FOR CONSTRUCTING.

The right to build a partition fence carries with it an exemption from liability while erecting it provided due care is used in its erection and it is left in a reasonably safe condition when completed. (*Lowe v. Guard*, 511.)

3. PARTITION FENCES—NEGLIGENCE IN CONSTRUCTION—LIABILITY FOR INJURY TO STOCK.

If an owner, while engaged in constructing a barbed-wire partition fence, negligently leaves it in such improper shape that the stock of another lawfully pasturing on adjoining premises become entangled in the wires and injured without the fault or contributory negligence of their owner, the party so constructing the fence is liable in damages for the injury. (*Lowe v. Guard*, 511.)

4. PARTITION FENCES—LIABILITY FOR NEGLIGENCE IN CONSTRUCTION.

If an owner constructs and maintains a partition barbed-wire fence in so negligent a manner that the stock of another lawfully pasturing on adjoining premises become entangled in the wires and injured, without the fault of their owner, the party so constructing the fence is liable in damages for such injury. (*McFarland v. Swihart*, 499.)

5. PARTITION FENCES—NEGLIGENCE IN CONSTRUCTION—NOTICE BY INJURED PARTY.

A person who sues for injury to his stock, caused by the improper construction of a partition fence, and who alleges that he is without fault, cannot, as matter of law, be charged with notice of the careless and negligent manner in which the fence was constructed. (*McFarland v. Swihart*, 499.)

6. PARTITION FENCES—BARB WIRE—NEGLIGENCE IN CONSTRUCTION.

Although erecting a barbed-wire partition fence is not of itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. (*McFarland v. Swihart*, 499.)

7. NEGLIGENCE—DANGEROUS PREMISES.

While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care enables him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it. (*Ryder v. Kinsey*, 623.)

8. NEGLIGENCE—DANGEROUS PREMISES—LATENT DEFECTS—BURDEN OF PROOF.

If a building falls without apparent cause, in the absence of explanatory circumstances, negligence is presumed, and the burden of proof is on the owner to show that he exercised ordinary care to keep it in a safe condition, but if such explanatory circumstances show that the cause of the fall of the building was a latent defect in its construction, and there is nothing to connect such cause with the owner's negligence, the burden of proof is upon the party asserting such owner's negligence, to show that such cause might have been discovered and removed by the exercise of ordinary care on the part of the owner. (*Ryder v. Kinsey*, 623.)

9. NEGLIGENCE—DANGEROUS PREMISES—LATENT DEFECTS.

If the cause of the fall of a building is a latent defect in its construction, which could not have been discovered by the exercise of ordinary care in inspecting the building, the owner cannot be held liable for an injury caused by such fall. (*Ryder v. Kinsey*, 623.)

10. NEGLIGENCE—RIGHT TO RECOVER FOR, AFTER COMPENSATION RECEIVED.

An owner of property wrongfully de-

stroyed by fire, may maintain an action in his own name against the wrongdoer, to recover for such destruction, although he has been fully compensated for his loss by an insurer, who, by subrogation, is entitled to any damages that he may recover in such action. (*Anderson v. Miller*, 812.)

See Contracts, 8.

RECEIVERS.

1. RECEIVERS.—CUSTODY by a receiver is possession by the court, and is exclusive alike of both parties to the suit. (*Green v. Coast Line R. R. Co.*, 379.)

2. RECEIVERS—INCOME—MORTGAGED PROPERTY.—The corpus of mortgaged property, whether realty or personalty, is no less the property of the mortgagor, after it is put into the hands of a receiver, than it was before, and it remains his property until sold; and the net income made by the receiver, though embraced in the mortgage, is also the property of the mortgagor so long as it remains subject to control and application by the court, the mortgagee having absolute title to neither, but a lien upon both; if, however, the income was not in existence when the mortgage was executed, his lien, as to it, is not a legal lien, but one which gets its ultimate efficiency from equity, through the doctrine either of equitable assignment or equitable estoppel. (*Green v. Coast Line etc. R. R. Co.*, 379.)

3. RECEIVERS—PRIORITY OF CLAIM FOR TORT OVER MORTGAGE—INSOLVENT RAILWAY CORPORATION.—A mortgage upon the property of a railway company, the mortgagor being left in possession, is, upon the company's insolvency, and as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponed, in equity, in favor of a claim for damages resulting from a tort committed by the company in operating its road, after the execution of the mortgage, but before the appointment of the receiver. (*Green v. Coast Line etc. R. R. Co.*, 379.)

4. RECEIVERS—PRIORITY OF CLAIM FOR DAMAGES OVER MORTGAGE—INSOLVENT RAILWAY CORPORATION—INCOME.—If a railroad company has mortgaged its property, including income, and a person recovers a judgment for damages caused by the negligence of the company, in operating its road before a receiver is appointed and proceedings to foreclose the mortgage are instituted against the company, which has become insolvent, the judgment, so far as the income is concerned, has priority over the mortgage; and income cannot be diverted from the payment of the judgment by the receiver's applying a portion of it to betterments, and the court's applying another portion of it to fees of the receiver and his counsel, while the case is in progress, where this is all the fund there is in court for distribution, and where the mortgage is more than sufficient to exhaust it, as this would incidentally allow the mortgagee to profit by this income to the detriment of the judgment creditor. (*Green v. Coast Line etc. R. R. Co.*, 379.)

See Banks, 14.

RECITALS.

See Execution, 8.

RECORDS.

See Attorney and Client, 2.

REDEMPTION.

See Execution, 9, 10; Statutes, 2.

REGULATIONS.

See Telegraph Companies, 1, 5.

RENEWAL NOTES.

See Banks, 2-4; Negotiable Instruments, 3.

RENTS.

See Executors and Administrators, 2; Vendor and Purchaser, 2, 3.

REPLEVIN.

REPLEVIN—CROSS-ACTIONS.—One whose property has been taken on replevin against his agent, cannot retake it by replevin from the plaintiff in the first action during its pendency. (*Larson v. Nichols*, 639.)

REPLICATION.

See Appeal, 10.

RESCISSION.

See Insurance, 21; Sales, 11.

RES GESTÆ.

See Evidence, 7.

RES JUDICATA.

See Counties, 3.

RESTAURANT.

See Innkeepers.

RESTITUTION.

See Appeal, 9.

RESTRAINT OF TRADE.

See Checks, 2; Contracts, 14; Injunctions, 5-7.

RETURN.

See Sheriffs.

RIPARIAN RIGHTS.

See Waters.

RULES.

See Telegraph Companies, 1, 5.

SALES.

1. SALE, WHEN COMPLETE.—The fact that the vendee reserves the right to examine and approve the property shipped to him is not a condition in favor of the vendor, and therefore does not amount to the reservation of the title by him until such examination and approval. (*Scharff v. Meyer*, 672.)

2. SALE, RESERVING POSSESSION OF BILL OF LADING.—The fact that the vendor of goods on shipping them retains possession of the bills of lading cannot affect the title to the property, which has already passed by its delivery to the carrier. (*Scharff v. Meyer*, 672.)

3. SALE FOR CASH, TITLE, WHEN VESTS BEFORE PAYMENT.—Though when a sale is made for cash, the title ordinarily

remains in the vendor until payment is made, such payment is waived as a condition precedent to the vesting of title in the consignee where the goods are shipped to him without any intention, so far as appears from the evidence, to retain title until they are paid for. (*Scharff v. Meyer*, 672.)

4. TITLE FROM VESTING.—If the seller and vendor of goods wishes to prevent the title from vesting in the vendee and consignee, and delivers them to the carrier, he must, by bill of lading, make the goods deliverable to his own order. (*Scharff v. Meyer*, 672.)

5. SALE, DELIVERY TO CARRIER.—As a general rule, the delivery of goods by a vendor to a carrier, or the master of a vessel, is equivalent to a delivery to the purchaser, subject only to the right of stoppage in transit. Especially is this true when, by the terms of the contract of sale, the goods were to be delivered to the carrier. Prima facie, the title vests in the purchaser on such delivery. (*Scharff v. Meyer*, 672.)

6. SALE OF GOODS TO BE MANUFACTURED, TITLE WHEN VESTS.—If goods are ordered to be manufactured, the title vests in the purchaser when the goods are manufactured and delivered to a common carrier consigned to him, if they are manufactured as ordered. (*Johnson v. Hibbard*, 787.)

7. SALE.—IF GOODS TO BE MANUFACTURED do not when manufactured conform in quantity and quality with the specifications of the order for them, the title thereto does not vest in the purchaser or person ordering them until his acceptance of them. (*Johnson v. Hibbard*, 787.)

8. SALE—ACCEPTANCE.—WHETHER GOODS MANUFACTURED UPON AN ORDER given for them, but which do not correspond to the specifications of the order, have been accepted so as to vest title in the purchaser and render him liable for the purchase price is a question of fact to be determined by the jury from all the evidence, where it appears that such goods were delivered to a common carrier, and were received by the purchaser, who did not notify the vendor of his objection to the goods and of his intention not to accept them until some weeks after their receipt. (*Johnson v. Hibbard*, 787.)

9. SALES—THE RIGHT OF STOPPAGE IN TRANSITU DEPENDS upon the insolvency of the vendee, either at the time of the sale of the property or subsequently and before possession, either actual or constructive, by the vendee. (*Bayonne Knife Co. v. Umbenhauer*, 114.)

10. SALES—STOPPAGE IN TRANSITU—ATTACHMENT—SOLVENCY OF VENDEE—EVIDENCE.—No stoppage in transitu can be asserted against a solvent debtor, and the vendor's failure to establish the insolvency of the vendee is fatal to his right of stoppage. The mere levy of an attachment, however, by creditors, before the delivery of the goods to the vendee, does not defeat the right; and where the vendor intervenes as claimant in the attachment suit, and there is a statutory trial of the right of property, evidence of the vendee's ownership of property in another state, and of its value, is admissible to establish his solvency, where the vendor and claimant is a nonresident of the state in which the attachment suit is brought. (*Bayonne Knife Co. v. Umbenhauer*, 114.)

11. SALES — RESCISSION — FRAUD — PUTTING IN STATU QUO.—A vendor, who seeks to have a contract of sale set aside upon the ground of fraud, must offer to return the purchase money in order to put the purchaser in statu quo. (*Cowan v. Fairbrother*, 733.)

See Carriers, 3; Execution, 4-10.

SATISFACTION.

See Chattel Mortgages; Joint Liability.

SEAL.

See Affidavits; Execution, 1.

SEARCHERS OF RECORDS.

NEGLIGENCE, PRIVACY OF CONTRACT.—If a searcher of records is employed by the owner of land to make an abstract to enable him to procure a loan thereon, and such loan being afterward procured on the abstract, and a negotiable note taken therefor, and the holder, being desirous of selling the note, procures the abstract to be continued so as to show the loan and the mortgage, the searcher is not answerable to the purchaser of such note for any injury suffered by him through the incorrectness of the abstract. There is no privity of contract between them. (*Tapley v. Wright, 206.*)

SETOFF.

COUNTERCLAIM ARISES OUT OF SUBJECT MATTER WHEN.—If in an action to recover for putting a window in a house, the defendant pleads the negligent manner in which the work was done by the plaintiff, and alleges resulting damages, this constitutes a claim arising out of the subject matter of the suit. (*Krebs Mfg. Co. v. Brown, 188.*)

SHERIFFS.

JUDGMENTS—CONCLUSIVENESS OF SHERIFF'S RETURN.—A sheriff's return, reciting that he has served summons on the defendant personally, is conclusive between the parties in an action subsequently brought to enjoin the judgment based upon such service, on the ground that the court was without jurisdiction of the person of such defendant. (*Goddard v. Harbour, 608.*)

SHERIFF'S DEEDS.

See Execution, 3.

SLANDER.

1. SLANDER.—WORDS INVOLVING MORAL TURPITUDE on the part of plaintiff, as well as charging him with an indictable offense, are slanderous per se. (*Morgan v. Kennedy, 647.*)

2. SLANDER.—WORDS CHARGING PLAINTIFF WITH DRUNKENNESS as well as with making others drunk, involve moral turpitude, and are slanderous per se. (*Morgan v. Kennedy, 647.*)

See Husband and Wife, 1.

SPECIFIC PERFORMANCE.

ADOPTION OF CHILD, SPECIFIC PERFORMANCE OF CONTRACT FOR.—An antenuptial contract to the effect that the husband shall take as his child the child of the intended wife and give it the same share in his estate after his death as if it were his own child, followed by the intended marriage, and the going of the child into his family and rendering him the same obedience and services as if it were his own child, will be specifically enforced in equity, though the property held on his death includes both real and personal estate. (*Nowack v. Berger, 663.*)

STATES.

See Conflict of Laws; Larceny, 6, 7.

STATUTE OF FRAUDS.

See Contracts, 3-11; Negotiable Instruments, 6; Pleadings, 3.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. CONSTITUTIONAL LAW—TITLE OF ACT.—In an act entitled an act to regulate the sale and gift of opium and other drugs named therein, the legislature may incorporate a provision making the having in the possession of such drugs criminal. (*Ex parte Mon Luck, 804.*)

2. CONSTITUTIONAL LAW.—THE LEGISLATURE MAY MAKE IT CRIMINAL for a person to have in his possession any opium, morphine, cocaine, and drugs of a like nature, unless procured on the prescription of a regularly licensed physician prescribing for the cure of disease. (*Ex parte Mon Luck, 804.*)

3. CONSTITUTIONAL LAW—OPIUM AND LIKE DRUGS, FORBIDDING POSSESSION OF.—A statute forbidding any person from having in his possession or offering for sale any opium, morphine, chloral, or cocaine without first obtaining a license from the county clerk of the county in which he or she resides or does business, and providing that such license shall be issued only to regularly qualified physicians who keep a stock of drugs and medicines for their own use in prescriptions, and regularly qualified druggists, and also forbidding the sale of any such drugs except on the prescription of a physician, and declaring that such drugs shall not be prescribed by physicians except for the cure of disease, is constitutional. By such statute the mere possession of one of the prohibited drugs is made criminal, though it is not kept for gift or sale. (*Ex parte, Mon Luck, 804.*)

4. CONSTITUTIONAL LAW.—A STATUTE MAKING THE FAILURE OF A BANKER within thirty days after receiving a deposit prima facie evidence of an intent on his part to defraud, is constitutional. (*Meadowcroft v. People, 447.*)

5. CONSTITUTIONAL LAW—BANKING, STATUTES, MAKING THE RECEIVING OF DEPOSITS WHILE INSOLVENT A CRIME.—A statute declaring that if any person doing business as a banker shall receive a deposit while insolvent, whereby it is lost to the depositor, such person shall be deemed guilty of embezzlement, is constitutional (*Meadowcroft v. People, 447.*)

6. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.—A statute making it a misdemeanor for a bank, banking corporation, or other person engaged in banking, to receive a deposit of money, or other thing of value knowing himself to be in failing circumstances or insolvent, and providing that upon conviction, he shall be fined not less than double the amount of such deposit, one-half of which shall be paid to the depositor, but that payment to the depositor of the amount deposited with costs, before conviction, shall be a complete defense to any prosecution under the statute, is void, as being in conflict with a constitutional provision declaring "that no person shall be imprisoned for debt." (*Carr v. State, 17.*)

7. STATUTES—EFFECT OF, ON DEBTS.—If a valid debt is created prior to the enactment of a statute, the collection of the debt cannot be brought within the prohibition of such statute. (*Pioneer Sav. etc. Co. v. Cannon, 858.*)

8. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS.—A redemption law extending the time for redemption from execution sales of real estate from four to twelve months can-

not be applied to foreclosure sales under mortgages executed prior to its passage without impairing the obligation of contracts. (*State v. Sears*, 808.)

9. PENAL STATUTES, CONSTRUCTION OF.—The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, because the primary consideration in all cases is what is the legislative will. Therefore, the rule of strict construction is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding captious objections, and even the demands of exact grammatical propriety. (*Meadowcroft v. People*, 447.)

See Bills of Lading; Corporations, 24; Indictment, 1, 2.

STOCK.

See Building and Loan Associations, 2; Contracts, 7; Corporations, 6, 8-10.

STOCKHOLDERS.

See Corporations, 3-5.

STOPPAGE IN TRANSITU.

See Sales, 9, 10.

STREETS.

See Municipal Corporations, 1.

STRIKES.

See Carriers, 1, 3.

SUBROGATION.

USURY.—CLAIM TO SUBROGATION growing out of an agreement void by reason of usury furnishes no basis for equitable relief. (*Roe v. Kiser*, 288.)

See Real Property, 10.

SUICIDE.

See Insurance, 23.

SUNDAY.

SUNDAY LAWS.—If the hirer of a team converts it to his own use, he is liable therefor, though the hiring was upon a Sunday. His act of conversion is not based upon, but is independent of, the contract. (*Doolittle v. Shaw*, 562.)

SURETYSHIP.

1. SURETIES, SECURITY TAKEN BY ONE, WHEN ENFORCEABLE IN FAVOR OF ALL.—When one of several sureties, after all have signed and before the debt is paid, obtains from the principal any mortgage or other security for his indemnity, it inures to the benefit of all of the sureties. (*Farmers' Nat. Bank v. Snodgrass*, 797.)

2. SURETIES WHOSE LIABILITIES ACCRUE AT DIFFERENT DATES.—Where several persons are sureties of the same principal, from whom one of them receives a mortgage to indemnify him against his liability on the obligations for which he was then a surety and against such liability as may accrue on his obligations thereafter executed as surety, and he and other persons subsequently

become sureties for the principal, the mortgage inures to the benefit of the original sureties whose equities are prior in point of time and are necessarily superior to the equities of persons who became sureties after the mortgage was made. (*Farmers' Nat. Bank v. Snodgrass*, 797.)

3. **USURY—RIGHTS OF SURETY.**—A surety on a usurious note, who voluntarily pays it, knowing its character, without request from his principal, is not entitled to relief under a mortgage given to secure him against liability as such surety. (*Roe v. Kiser*, 288.)

4. **INSURANCE—SURETYSHIP—FRAUD OR DISHONESTY OF EMPLOYEE.**—If a fidelity and casualty company binds itself to make good to a bank, to a specified extent, such pecuniary loss as it may sustain by reason of the fraud or dishonesty of an employé named, in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer," and he is afterward, during the period covered by the contract, appointed assistant cashier, but in that capacity brings loss to the bank, through his fraud or dishonesty, the company is as much surety for him in the latter capacity as in the former, and must make good to the bank its losses sustained through the acts of its assistant cashier. (*Fidelity etc. Co. v. Gate City Nat. Bank*, 440.)

5. **INSURANCE—SURETYSHIP—FRAUD OR DISHONESTY OF EMPLOYEE—IMPUTING KNOWLEDGE TO EMPLOYER—CONSTRUCTIVE NOTICE.**—Although a contract, binding a fidelity and casualty company to make good to a bank, to a specified extent, such pecuniary loss as it may sustain by reason of the fraud or dishonesty of its assistant cashier, may require the bank, upon discovering him to be untrustworthy, to give prompt notice thereof to the company, yet, where there is nothing in the contract requiring the bank to exercise any degree of diligence in watching or inquiring into his actions, to save the company from loss through his misconduct, the knowledge of the bank's cashier, of fraud or dishonesty on the part of the assistant cashier, or of any act done by him involving a loss to the company of more than one hundred dollars, is not imputable to the bank itself. The doctrine of constructive notice has no application to such a transaction, and the bank is bound to impart only actual knowledge on its part. (*Fidelity etc. Co. v. Gate City Nat. Bank*, 440.)

6. **PLEADING—INSURANCE AGAINST FRAUD OR DISHONESTY OF EMPLOYEE—PLEA, SUFFICIENCY OF.**—If, in an action by a bank upon a contract by which a fidelity and casualty company binds itself to make good to the bank, to a specified amount, such pecuniary loss as it may sustain by reason of the fraud or dishonesty of its assistant cashier, the defendant alleges, by way of amendment to his plea, that the employé had, within the knowledge of the bank, been guilty of a specified default, such amendment should be stricken on demurrer, as it is not legally complete without a further allegation that the plaintiff had failed to duly notify the defendant of the default in question. (*Fidelity etc. Co. v. Gate City Nat. Bank*, 440.)

See Limitations of Actions, 5, 6; Debtor and Creditor, 2.

SURPRISE.

See New Trial, 1.

SWINDLING.

See Criminal Law, 2.

TACKING.

See Adverse Possession, 4.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES HAVE THE RIGHT TO ESTABLISH PROPER RULES AND REGULATIONS and to insert in their contracts for service proper conditions and stipulations, but they must be reasonable and cannot be permitted to stand if it is sought thereby to evade some legal obligation or limit a common-law or statutory right. (*Western Union Tel. Co. v. Moore*, 515.)

2. TELEGRAPH COMPANIES—PREPAYMENT OF SPECIAL DELIVERY CHARGES.—A regulation of a telegraph company requiring the payment of special delivery charges before transmission for a telegram to be delivered beyond free delivery limits, does not excuse delay in delivery or nondelivery of the telegram, unless the sender knows or is informed that the residence of the sendee is beyond free delivery limits and of the amount of the special delivery charge. (*Western Union Tel. Co. v. Moore*, 515.)

3. TELEGRAPH COMPANIES.—PREPAYMENT OF SPECIAL DELIVERY CHARGES before transmission of a telegram, even when properly chargeable, is not under all circumstances prerequisite to the duty to deliver in a city or town, as this duty ordinarily attaches when the message is received and its transmission is undertaken. (*Western Union Tel. Co. v. Moore*, 515.)

4. TELEGRAPH COMPANIES — SPECIAL DELIVERY CHARGES—PREPAYMENT OR GUARANTY.—Under a condition in a telegraph company's printed blank requiring the payment of special delivery charges for delivery of a telegram beyond free delivery limits, payment of such charges in advance, or a guaranty therefor is not required, the fair inference being that the amount of the charge is not ascertainable until the service is performed. (*Western Union Tel. Co. v. Moore*, 515.)

5. TELEGRAPH COMPANIES—PRINTED CONTRACTS—CONSTRUCTION.—Rules and regulations, conditions, and limitations, contained in printed contracts prepared by telegraph companies, must be construed most strongly against them. (*Western Union Tel. Co. v. Moore*, 515.)

6. TELEGRAPH COMPANIES—LIABILITY FOR DELAY.—It is as much the duty of a telegraph company to use diligence in delivering messages without unreasonable delay as in transmitting them, and it is generally liable in special damages for such delay or for the nondelivery of a message. (*Western Union Tel. Co. v. Moore*, 515.)

See Electric Companies, 1.

TIMBER.

See Trover, 4, 6.

TORTFEASORS.

See Joint Liability; Insurance, 3.

TORTS.

See Banks, 15; Joint Liability; Mortgages, 1.

TRESPASS.

See Chattel Mortgages, 5.

TRIAL.

1. TRIAL—READINESS TO PROCEED—DETERMINATION OF QUESTIONS.—The court has the right to demand of the parties

whether they are ready before he is required to hear and determine any question connected with the cause. (*National Fertilizer Co. v. Holland*, 101.)

2. JURY TRIAL, ERROR IN DISALLOWING A CHALLENGE.—If it appears that two of the persons called as jurors in an action against a railway corporation have actions pending against it involving the same issues, and have opinions respecting the chief point in issue, it is error in the trial court to overrule a challenge, and to hold them competent to act as jurors in the case. (*Little Rock etc. Ry. Co. v. Wells*, 216.)

3. PRACTICE.—TO ALLOW LEADING QUESTIONS is within the discretion of the trial court. (*Krebs Mfg. Co. v. Brown*, 188.)

4. TIME—REASONABLE—MIXED QUESTION OF LAW AND FACT.—The time within which an act is to be performed, when no time is specified, is within a reasonable time, which is often a mixed question of law and fact. If the facts are not in conflict, it is a question for the court, and it is error to submit it to the jury; but, if the facts are in dispute, it is the duty of the court to submit them to the jury. (*Comer v. Way*, 93.)

5. VENUE—PROOF OF.—It is sufficient in a criminal prosecution for the state to prove the venue by a preponderance of the evidence. Proof beyond a reasonable doubt is not required. (*Wilson v. State*, 303.)

6. CRIMINAL PRACTICE.—A VERDICT TO THE EFFECT THAT THE TWO PERSONS accused shall be fined a sum, and imprisoned for a time, named is sufficient, and indicates that each shall be fined such sum. (*Meadowcroft v. People*, 447.)

See Appeal; Instructions.

TROVER.

1. TROVER.—ACTUAL POSSESSION OF LAND on the part of its owner is not essential to support an action by him for timber severed therefrom, in the absence of adverse possession in another. (*White v. Yawkey*, 159.)

2. CONVERSION, WHEN DOES NOT RESULT FROM THE USE OF PROPERTY IN VIOLATION OF A CONTRACT.—If a person merely uses the property of another in a manner and for a purpose not authorized by the contract under which he obtained possession of it, but without destroying it or intending to injure or impair the residuary interest of the ballor, such misuse does not determine the ballment, and therefore is not a conversion for which trover will lie. (*Doolittle v. Shaw*, 562.)

3. CONVERSION.—THE HIRER OF A TEAM to drive from one place to another and return does not, by merely driving it beyond such place, become guilty of its conversion, there being no exercise of dominion over it in repudiation of, or inconsistent with, the owner's rights. (*Doolittle v. Shaw*, 562.)

4. TROVER CAUSED BY MISTAKE.—It is not a defense to an action of trover for cutting and converting trees on the plaintiff's land that the defendants were rightfully engaged in cutting timber on adjoining land, and whatever they did grew out of a mistake as to the boundary line. Such a defense may, however, affect the amount of the recovery. (*White v. Yawkey*, 159.)

5. PRACTICE—IMMATERIAL PLEA, TAKING ISSUE UPON. Though it is not material that the plaintiff, in an action for cutting trees upon his land and converting them to the defendant's use, should have had the actual possession of such land at the time of the wrong, yet if the defendant tenders a plea upon this subject, and the plaintiff, without demurring, joins issue thereon, such issue is, by

the pleadings, made material, and it becomes necessary for the plaintiff to establish such actual possession. (*White v. Yawkey*, 159.)

6. DAMAGES, MEASURE OF, FOR CUTTING TREES ON ANOTHER'S LAND.—If an action of trover is brought for the conversion of timber cut on the plaintiff's land through an inadvertent trespass, the measure of damages is the value of such timber immediately after it is severed from the land, with legal interest. (*White v. Yawkey*, 159.)

7. DAMAGES, MEASURE OF, IN TROVER—ENHANCED VALUE OF PROPERTY.—Where purchasers, innocent of wrongdoing, from an inadvertent trespasser, have, by the expenditure of time, labor, and money, enhanced the value of the property converted and are sued for its conversion, the measure of damages is the injury done to the plaintiff by the original conversion, and not the value of the property thus enhanced by the defendants' acts or those of their vendor. Such is not the rule if the trespass is willful, or in bad faith. (*White v. Yawkey*, 159.)

See *Chattel Mortgages*, 5.

TRUSTS.

1. TRUSTS — PROCEEDS OF LAND — CONSIDERATION.—While an express trust in land cannot be created by parol, a parol agreement to hold the proceeds of a sale of the land, in trust for another is valid, if based upon a sufficient consideration. The conveyance, by a wife, of her inchoate interest in land is sufficient consideration to establish such a trust. (*Talbott v. Barber*, 491.)

2. TRUSTS—RIGHTS OF PARTY ACQUIRING LAND IMPRESSED WITH.—A devisee of land impressed with a trust to pay another a certain portion of the proceeds of a sale thereof takes the land charged with, and subject to, such trusts, of which he has actual or constructive notice. (*Talbott v. Barber*, 491.)

3. TRUSTS, INCONSISTENT CLAIMS AND REMEDIES.—One who sues repudiating a trust and seeking to have it declared void is not entitled to relief on the ground that the trustees have been guilty of acts of spoliation and maladministration, and that the court therefore ought to take charge of the administration of the trustees. (*Barrett v. Pollak Co.*, 172.)

See *Corporations*, 21; *Limitations of Actions*, 2, 8.

UNDUE INFLUENCE.

See *Wills*, 2, 6-9.

USURY.

1. USURY.—A CONTRACT IS USURIOUS when it is the purpose of the lender to get more than the lawful rate of interest, and there is any contingency by which he may do so, whether it is so apparent that it becomes the duty of the court so to declare, or whether it is a case in which it is necessary that the jury should find the facts. (*Miller v. Life Ins. Co.*, 741.)

2. USURY—WHAT CONSTITUTES.—A note bearing legal interest is rendered usurious by a contemporaneous verbal agreement to pay twice the legal rate of interest on the money thus loaned. (*Roe v. Kiser*, 288.)

3. USURY.—AN USURIOUS TRANSACTION is one in which it is intentionally provided that a party may take more than the lawful rate of interest for the loan of money. (*Miller v. Life Ins. Co.*, 741.)

4. USURY—DOCTRINE UPON WHICH IT RESTS.—If it is the intent or purpose of the lender of money to get more than the law-

ful rate of interest, and there is a provision, a condition, or a contingency in, or connected with, the contract of loan, by which he may do so, the contract is usurious. (*Miller v. Life Ins. Co.*, 741.)

5. USURY—DEPENDS UPON WHAT.—The question of usury does not depend upon the question whether the lender actually gets more than the legal rate of interest or not; but does depend upon whether there was a purpose in the mind of the lender to make more than legal interest for the use of money, and whether, by the terms of the transaction, and the means used to effect the loan, he may, by its enforcement, be enabled to get more than the legal rate. If so, the transaction is usurious. (*Miller v. Life Ins. Co.*, 741.)

6. USURY—"CHANCE OF ADVANTAGE."—A stipulation in a contract of loan even for a "chance of advantage" beyond legal interest, is illegal, and courts will not enforce the contract. (*Miller v. Life Ins. Co.*, 741.)

7. USURY—POLICY OF LIFE INSURANCE—ASSIGNMENT—ILLUSTRATION.—If a life insurance company lends a sum of money to a borrower at the full legal rate of interest, payable monthly, upon abundant security by way of mortgage upon real estate, but, in addition to, and as a condition of, the loan, requires the borrower to take out and assign to it an endowment policy for a sum equal to the amount of the loan, upon which the premiums must be paid monthly for seven years, or until the borrower's death, and the payment of which premiums is also secured by the mortgage, thus affording the company the "chance" to make several hundred dollars in addition to the legal rate of interest, the transaction is usurious upon its face, and a court will so declare. (*Miller v. Life Ins. Co.*, 741.)

8. USURY—LIFE POLICY OF INSURANCE AS CONDITION PRECEDENT TO LOAN—GENERAL RULE.—If a borrower, as a condition of receiving a loan, is required to take a policy of life insurance from the lender, and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, it is generally held that the profit thus derived by the lender is equivalent to additional interest, and therefore usurious. (*Miller v. Life Ins. Co.*, 741.)

9. USURY—FOREIGN CONTRACT.—If a note and mortgage of lands situated in one state are made and executed in another state, usury cannot be set up as a defense to an action thereon in the former state, provided the interest contracted to be paid is legal under the laws of the state where the contract was made. (*Pioneer Sav. etc. Co. v. Cannon*, 858.)

10. USURY—WHEN A QUESTION OF LAW.—An agreement which, in legal effect, gives to the lender of money any profit or advantage, certain or contingent, more than the legal rate, is usurious upon its face, and the court must so declare as a matter of law. (*Miller v. Life Ins. Co.*, 741.)

11. USURY—WHEN A QUESTION OF FACT.—If the true character of a transaction is equivocal, and its usurious character is not manifest but depends upon facts and circumstances connected with the transaction, as a part of the *res gestae*, it then becomes a question of fact as well as of law, and must be submitted to the jury. (*Miller v. Life Ins. Co.*, 741.)

See Evidence, 11; Subrogation; Suretyship, &

VACANT AND UNOCCUPIED.

See Insurance, 19.

VARIANCE.

See Pleading, 1

VENDOR AND PURCHASER.

1. VENDOR'S LIEN.—A grantor of real estate by a deed absolute who delivers possession to his vendee has not an implied lien on the real estate granted for unpaid purchase money. (*Frame v. Sliter*, 781.)

2. VENDOR'S RIGHT TO RENTS.—One who has sold land and taken notes for the purchase price, which he has assigned, is not entitled to rents, although he retains the legal title to the lands so sold, and if he becomes insolvent and his estate goes into the hands of a receiver, neither the latter, nor the general creditors whom he represents, are entitled to such rents. (*Senter v. Williams*, 200.)

3. PARTIES.—PURCHASERS OF LANDS AND PARTIES HOLDING NOTES FOR THE PURCHASE PRICE under an assignment from the vendor are necessary parties to a proceeding to determine who is entitled to rents accruing from such lands, and such rents, if collected by the receiver, cannot be distributed in the absence of those parties. (*Senter v. Williams*, 200.)

VENDOR'S LIEN.

See Vendor and Purchaser, 1.

VENIRE.

See Trial, 5.

VERDICT.

See Appeal, 7; Embezzlement, 2; Instructions, 3.

VERIFICATION.

See Accounts, 2.

WAGES.

See Executors and Administrators, 9.

WAIVER.

See Appeals, 10; Forfeiture; Insurance, 5, 6, 10-12, 15-17, 27, 30.

WATERS.

1. WATER AND WATERCOURSES—USE OF WATER.—The use to which different proprietors may apply the water of a stream which flows through their land is not the foundation of their right to the flow of the stream, nor is the owner's right to the flow of the stream governed by the uses to which the water may be applied, but it is a right annexed to the land and a part thereof, and is an inherent element of the property which he has in the land itself. This right in each proprietor is, however, relative to the rights of the other riparian proprietors, and is to be exercised with proper regard to those rights. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

2. ACCRETION—THE OWNER OF LANDS FRONTING on an unnavigable lake does not acquire title to the lands within the lake or any part thereof upon the recession of the waters from a river cutting into the lake and draining it. (*Noyes v. Collins*, 571.)

3. LAKES AND PONDS, OWNERSHIP OF LANDS BENEATH. Owners of lands bordering upon lakes and ponds do not, in Iowa, take title to the thread of the stream. If the government meanders such a lake and conveys the adjacent uplands, no title passes to any part of the bed of the lake. (*Noyes v. Collins*, 571.)

4. WATERS AND WATERCOURSES—LOSS BY ABSORPTION —ARTIFICIAL DELIVERY TO LOWER OWNER.—If a large

amount of water is naturally lost by absorption and evaporation in passing through its natural channel from the lands of an upper riparian owner to those of the lower owner, the upper owner may provide artificial means for carrying all the water of the stream in excess of the amount so lost to the lands of the lower owner, and he may retain for his own use so much of the water thus otherwise lost as he can save by artificial means. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

5. WATER AND WATERCOURSES — APPORTIONMENT OF FLOW BY PERIODS OF TIME.—A court of equity has power to apportion the flow of water in a stream to the respective riparian owners by periods of time, rather than by a division of its quantity, so that each may have the full flow of the stream during such designated period, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner would better conserve the rights of all the riparian owners. This is especially so when the stream, instead of increasing as it goes toward the sea, constantly diminishes until it finally disappears. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

6. WATER AND WATERCOURSES—APPORTIONMENT OF FLOW BY PERIODS OF TIME—PRESUMPTION ON APPEAL.—When the trial court has found that a division of the flow of a stream between riparian proprietors by specific periods of time is reasonable and equitable under all of the facts of the case, and the evidence is not presented to the appellate court, the latter must presume that the findings were sustained by the evidence and the court duly considered all the evidence before it, as well as all uses for which the water was available, both for domestic and irrigation purposes. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

7. WATER AND WATERCOURSES—APPORTIONMENT OF FLOW BY PERIODS OF TIME FOR DOMESTIC USE.—The same principles which authorize an apportionment of the flow of a stream by periods of time for purposes of irrigation, justify such apportionment for domestic uses. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

8. WATER AND WATERCOURSES—APPORTIONMENT OF FLOW FOR DOMESTIC PURPOSES.—It cannot be said, as matter of law, that the inferior riparian proprietor has a necessity for a continuous flow of a stream for domestic purposes, any more than for purposes of irrigation. In either case he is entitled to only a reasonable use, depending upon all the circumstances in the case. If neither of the proprietors has any use for the water, other than for domestic purposes, the length of the periods of time during which each is entitled to the flow of the stream, as well as the frequency of their recurrence, must be fixed different from what they would be if the waters were used for irrigation alone. Whenever it appears that the only method by which either proprietor can have a reasonable use of the stream is by allowing to each its full flow for a reasonable time, the only equitable adjustment of their rights is to thus apportion the flow. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

9. WATER AND WATERCOURSES—APPORTIONMENT OF FLOW FOR IRRIGATION.—The right of a riparian owner to the use of the water of a stream is not measured by the amount of water which he actually uses, nor is it to be assumed that the same amount of land will be cultivated in each succeeding year, in apportioning the water between riparian proprietors. The amount of irrigable land belonging to each party, rather than the amount of land already under cultivation is properly made a controlling element in adjusting their respective rights to the flow of the stream. (*Wiggins v. Muscupiabe Land etc. Co.*, 337.)

WILLS.

1. WILLS—TESTAMENTARY CAPACITY.—The fact that a testatrix was fifty-six years of age at the time of her death does not authorize the jury to draw any unfavorable inference against the validity of the will upon the ground that she was an "old lady," even if she were of that age at the time of the execution of the will. (Henry v. Hall, 22.)

2. WILLS—CAPACITY AND UNDUE INFLUENCE—PRESUMPTIONS.—It is not within the province of a jury to determine the duty of a testator to his next of kin, and no presumption of want of testamentary capacity or undue influence arises from the mere fact that a testator has not disposed of his property as a jury supposes it should have been disposed of, or that a different disposition was made of it than made by law in cases of intestacy. These are mere circumstances to be weighed with other evidence. (Henry v. Hall, 22.)

3. WILLS—TESTAMENTARY CAPACITY.—The fact that a testatrix of good mind and self-reliant character, made and executed her will while she was quite sick, and declared after her recovery that "she could not remember what happened during her illness, and that it all seemed like a dream," is not sufficient to show a want of testamentary capacity. (Henry v. Hall, 22.)

4. WILLS—UNNATURAL BEQUESTS.—It cannot be said as matter of law that affection for one, though not of kin, raised from infancy by the donor and who has always been a member of his family, is unnatural, or that a gift or bequest to such person is unnatural. It is a question of fact for the jury. (Henry v. Hall, 22.)

5. WILLS—UNNATURAL BEQUESTS.—A will is not necessarily unnatural because of a discrimination between heirs of the same degree, nor because of the entire exclusion of a part or all of them. The circumstances of the case must determine the naturalness of a donation or bequest. (Henry v. Hall, 22.)

6. WILLS—UNDUE INFLUENCE—EFFECT OF.—If the evidence shows that a will, in part, was the result of undue influence, and in part the act of the testator's own free will, it is not wholly void. The latter part must stand while the former part must be annulled. (Henry v. Hall, 22.)

7. WILLS—UNDUE INFLUENCE.—The fact that the father of a devisee, not related to the testatrix, was present at the signing of the will, and participated in its preparation and execution, does not raise a presumption of undue influence, in the absence of evidence to show that the testatrix was dependent on him, or that he had any influence with or over her, or that he ever advised with her in business matters, or held or occupied confidential or influential relations toward her. (Henry v. Hall, 22.)

8. WILLS—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS.—The facts that a husband of a large beneficiary, who is not related to the testatrix, occupied confidential relations with the latter, attended to and managed her business, employed an attorney to draft the will, dictated its provisions, and enjoined secrecy as to its contents and execution, raises a presumption of undue influence, and casts the burden of proof on such devisee to show that the devise to her was not induced by fraud and coercion on her part, directly or indirectly. (Henry v. Hall, 22.)

9. WILLS—PRESUMPTION OF UNDUE INFLUENCE does not arise from the mere fact of taking an active part in procuring the execution of a will. A presumption of fraud or deceit may arise when the writer of a will takes a legacy under it, but not of undue influence. Such conduct or participation, to create a presumption of undue influence, must be coupled with a benefit under the will, and

evidence of confidential relations, or dependency, or some position or fact which tends to show that the party was able to exercise an undue influence if he desired to do so. (*Henry v. Hall*, 22.)

10. WILLS, DEVISEES' INTEREST, WHEN NOT AFFECTED BY TESTATOR'S AGREEMENT TO DEVISE TO ANOTHER.—

Where a testator had agreed to give his stepson a share in his estate as if he were his own son, but, instead of doing so, gave him nothing, devising certain property to his children and the stepson brings a suit for specific performance of the contract in his favor, and recovers judgment, this does not destroy or impair the devise to his children, because the interest which he has by his agreement may be set apart to him without impairing the devise to them. (*Nowack v. Berger*, 663.)

See Contracts, 9, 13; Equity, 1-3; Witnesses, 4.

WITNESSES.

1. WITNESSES—COMPETENCY—DISCRETION OF COURT.—

If the plaintiff has prima facie established his case by competent evidence, the court may, in its discretion, and of its own motion, permit the plaintiff, otherwise incompetent under the statute, to give his version of the transaction in dispute. (*Talbott v. Barber*, 491.)

2. WITNESSES—COMPETENCY.—If a party to an action claiming to be the widow and entitled to a share of the estate of her alleged husband deceased, is incompetent under the statute to testify as to certain facts necessary to be proved on the part of her son, also a party to the suit and claiming a share of such estate, she is not rendered a competent witness in behalf of her son by a disclaimer of all interest in her own behalf after the close of the evidence, but, after such disclaimer, she is a competent witness for the son on a new trial. (*Shorten v. Judd*, 587.)

3. WITNESS, COMPETENCY OF, WHEN A PARTY TO A CONTRACT AFTER THE DEATH OF THE OTHER.—Under the statutes of Missouri, a wife is not, after the death of her husband, a competent witness to prove an antenuptial contract between them, in a suit by her son against the personal representative and heirs of her husband to enforce a provision of such contract in favor of such son. (*Nowack v. Berger*, 663.)

4. WILLS—WITNESSES — INTEREST — COMPETENCY.—The estate of the testator is not a party in interest in proceedings to probate the will so as to prevent all parties interested from testifying to any fact which is relevant and material to the issue. (*Henry v. Hall*, 22.)

5. EVIDENCE—MARKET VALUE.—A witness may be allowed to testify to values, though his opinions are based upon market reports and quotations. (*Hudson v. Northern Pac. Ry. Co.*, 550.)

6. EVIDENCE — FAMILY RESEMBLANCE.—OPINIONS OF WITNESSES as to family resemblance between a child and its alleged father are not admissible as proof of paternity. (*Shorten v. Judd*, 587.)

7. EVIDENCE—OPINIONS AND CONCLUSIONS.—A witness who has had long experience in the shipping of livestock upon cars may be permitted to state whether, in his opinion, the bars in the car were sufficient and suitable to hold horses shipped therein. (*Betts v. Chicago etc. Ry. Co.*, 558.)

See Process.



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